(18)

No. 00-952-CSX Title: Wisconsin Department of Health and Family Services, Petitioner
v.
Irene Blumer

Docketed:
December 11, 2000 Court: Court of Appeals of Wisconsin, District IV

Entry	Date	Proceedings and Orders
	Dec 11 2000	Petition for writ of certiorari filed. (Response due January 17, 2001)
	Jan 9 2001	Order extending time to file response to petition until January 17, 2001.
	Jan 17 2001	Brief of respondent Irene Blumer in opposition filed.
	Jan 17 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Jan 29 2001	Reply brief of petitioner Wisconsin Department of Health and Family Services filed.
	Jan 31 2001	DISTRIBUTED for Conference of February 16, 2001
	Feb 20 2001	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jun 1 2001	Brief amicus curiae of United States filed.
	Jun 5 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 8 2001	Brief of petitioner in reply to brief of United States as amicus curiae filed.
	Jun 13 2001	Brief of respondent in reply to brief of the United States as amicus curiae filed.
	Jun 25 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 25 2001	Petition GRANTED. SET FOR ARGUMENT December 3, 2001. **********
	Jul 10 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including September 7, 2001. Order extending time to file respondent's brief on the merits to and including October 17, 2001.
	Sep 7 2001	Joint appendix filed.
	Sep 7 2001	Brief of petitioner Wisconsin Department of Health and Family Services filed.
	Sep 7 2001	Brief amicus curiae of United States filed.
	Sep 7 2001	Brief amicus curiae of State Medicaid Agencies filed.
	Sep 7 2001	Brief amicus curiae of American Health Care Association filed.
	Sep 25 2001	CIRCULATED.
	Oct 17 2001	Brief amici curiae of AARP and NCCNHR filed.
	Oct 17 2001	Brief amici curiae of Ohio State Bar Association, et al. filed.
	Oct 17 2001	Brief amicus curiae of SeniorLAW/Legal Action of Wisconsin, Inc. filed.
	Oct 17 2001	Brief amicus curiae of State Bar of Wisconsin's Elder Law Section filed.
	Oct 17 2001	Brief of respondent Irene Blumer filed.
	Oct 18 2001	Record filed.

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No. 00-952-CSX

Entry	Date	Proceedings and Orders
	Oct 26 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 16 2001	Brief of petitioner Wisconsin Department of Health and Family Services reply brief (typewritten) filed.
	Nov 16 2001	Reply brief of petitioner Wisconsin Department of Health and Family Services filed.
	Nov 21 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 3 2001	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a Medicaid case requiring interpretation of the spousal impoverishment provisions of the federal Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000). When a married individual institutionalized in a nursing home applies for Medicaid, the spousal impoverishment provisions of 42 U.S.C. § 1396r-5 permit the community spouse living at home to retain certain income and resources to meet his or her own monthly maintenance needs rather than using them to defray the medical expenses of the institutionalized spouse. In determining whether the community spouse is entitled under the statute to shelter resources in excess of the standard resource allowance, Wisconsin, like thirty-five other states, requires that income of the institutionalized spouse first be attributed to the community spouse to provide for his or her current needs. The question presented is:

Whether the "income first" requirement of the Wisconsin Medicaid spousal impoverishment statute, Wis. Stat. § 49.455(8)(d), requiring that the income of the institutionalized spouse be attributed to the community spouse before excess resources are transferred to the community spouse, conflicts with 42 U.S.C. § 1396r-5.

LIST OF PARTIES

Actual parties to the proceedings in the Wisconsin Court of Appeals and Wisconsin Supreme Court were:

The Wisconsin Department of Health and Family Services, State of Wisconsin,

Petitioner herein,

Irene Blumer, Petitioner-Appellant in the Wisconsin courts,

Respondent herein.

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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, District IV, is reported at 237 Wis. 2d 810, 615 N.W.2d 647 (2000). The order of the Wisconsin Supreme Court denying discretionary review is unreported.

JURISDICTION

The decision of the Wisconsin Court of Appeals was filed on June 8, 2000. Petitioner filed a timely petition for discretionary review in the Wisconsin Supreme Court. The order denying review was filed September 12, 2000 (App. 18a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

Because of their length, the spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000), created by § 303 of the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, § 303, 102 Stat. 683, and of Wis. Stat. § 49.455 (1995-96) are set forth in the Appendix at 33a-76a.

The particular provision of the MCCA on which the court below relied when it concluded that the Wisconsin statute conflicts with the federal statute, 42 U.S.C. § 1396r-5(e)(2)(C), provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The "income first" provision of the Wisconsin Statutes contained in Wis. Stat. § 49.455(8)(d) (1995-96),[1] states in pertinent part:

> (8) FAIR HEARING. . . .
>
> . . . .
>
> (d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, *the department may not establish an amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)*
> . . . .

(Emphasis supplied).

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[1]Wisconsin Stat. § 49.455(8)(d) has not changed significantly since this case arose in 1996. *See* Wis. Stat. § 49.455(8)(d) (1997-98). However, the 1995-96 version of the statute is the one involved in this case.

STATEMENT OF THE CASE

A. Statutory Background.

Medicaid is a joint state and federal program designed to provide necessary medical care for persons unable to afford such care. *See* 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). Generally, only those individuals with income and resources below prescribed levels are eligible for Medicaid. Where an individual's monthly income exceeds the prescribed level, the individual must, to be eligible for Medicaid, incur medical expenses sufficient to reduce his or her income to the prescribed level, a process known as "spending down." Excess resources must also be spent down[2] to the prescribed level.

The spousal impoverishment provisions of the federal Medicaid statute, 42 U.S.C. § 1396r-5, establish special rules for determining the Medicaid eligibility of married persons who are institutionalized, typically in a nursing home (the institutionalized spouse), and who have a spouse in the community (the community spouse).

Before 1988, individuals who qualified for Medicaid, either as "medically needy" or under an optional program, were required to apply much of their personal income to the cost of their nursing home care. Only limited amounts (which varied greatly from state to state) could be made available to a spouse living in the community. *See* H.R. Rep. No. 100-105, at 66-68 (1987), *reprinted in* 1988 U.S.C.C.A.N. 803, 889-91. In addition, except for a very low resource limit, resources owned either individually by the institutionalized spouse or jointly by both spouses

[2]In the context of Medicaid eligibility, "spending down" is technically limited to spending income. This petition also uses the term in a non-technical sense to refer to the liquidation and spending of resources.

were considered available solely for the costs of the care of the institutionalized spouse. *Id.* These income and resource limits had the effect of severely impoverishing the community spouse in many cases. *See Schachner v. Perales*, 85 N.Y.2d 316, 624 N.Y.S.2d 558, 648 N.E.2d 1321, 1322 (1995); *Mistrick v. Div. Med. Assist.*, 154 N.J. 158, 712 A.2d 188, 194 (1998).

At the same time, pre-1988 law left open loopholes that allowed couples to shelter large amounts of resources solely in the community spouse's name or in trusts so that the institutionalized spouse could qualify for Medicaid at a higher level of wealth than that contemplated for the program, which was designed to provide assistance to the poor. *See* H.R. Rep. No. 100-105, at 65-67, *reprinted in* 1988 U.S.C.C.A.N. at 888-90.

The purpose of the Medicare Catastrophic Coverage Act was to end the "pauperization [of the community spouse] by assuring that [he or she] has a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H.R. Rep. No. 100-105, at 65, *reprinted in* 1988 U.S.C.C.A.N. at 888. The MCCA is the congressional response to the severe, impoverishing limitations under previously existing provisions of the Medicaid Act on the income and resources that a community spouse could retain to remain in the community. *See generally* H.R. Conf. Rep. No. 100-661, at 257-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-37. At the same time, Congress sought to end perceived abuses that permitted community spouses in some cases to insulate excessive amounts of the couple's assets from being used to defray the costs of care for the institutionalized spouse. *Cf.* H.R. Rep. No. 100-105, at 66-67, *reprinted in* 1988 U.S.C.C.A.N. at 889-90.

The spousal impoverishment provisions of 42 U.S.C. § 1396r-5, have six main subsections, § 1396r-5(a)-(f). *See*

id.; see generally H.R. Conf. Rep. No. 100-661, at 257-68, *reprinted in* 1988 U.S.C.C.A.N. at 1035-46. Subsection 1396r-5(a) provides that institutional spouses are entitled to special treatment in determining Medicaid eligibility and that the provisions of the MCCA supersede other provisions of the Medicaid Act which are inconsistent.

The Resource Provisions

Subsections 1396r-5(c) and (f) created new rules for the treatment of marital resources when an institutionalized spouse applies for Medicaid and, subsequently, when the institutionalized spouse seeks to transfer certain resources to the community spouse. Under subsection 1396r-5(c)(1), the total value of the couple's resources[3] at the beginning of the period of institutionalization is calculated and a one-half share is allocated to each spouse. Depending on the amount of each spouse's one-half share, the institutionalized spouse may need to spend virtually all of his or her resources in order to become Medicaid eligible. By contrast, the community spouse is permitted to retain a community spouse resource allowance (CSRA or "resource allowance"), which usually equals that spouse's entire one-half share.[4] The amount of the resource allowance can be adjusted at a fair hearing or by court order. *See* subsections (e)(2)(C) and (f)(2). The interspousal allocation of resources is made without regard to state marital or community property laws.

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[3]In making this calculation, "resources" does not include the home, an automobile, personal belongings and certain other forms of property. *See* 42 U.S.C. §§ 1396r-5(c)(5) and 1382b.

[4]Under subsection 1396r-5(f)(2)(A), the resource allowance does not equal the community spouse's one-half share when that share is below the resource allocation minimum (currently $50,000 adjusted annually), or above the maximum resource allocation (currently $84,120, adjusted annually). As adjusted, the maximum resource allowance in Wisconsin at the time Irene Blumer applied for Medicaid was then $76,740. Thus, for example, if a couple's joint resources then totaled $200,000, the resource allocation was $76,740, rather than one-half of $200,000.

The couple's resources are considered available to an institutionalized spouse (and therefore must be spent) only to the extent they exceed the resource allowance as of the time of application for Medicaid. *See* subsection (c)(2)(A) and (B). Once Medicaid eligibility is established for the institutionalized spouse, no resources of the community spouse can be deemed available to the institutionalized spouse (even if, by inheritance or otherwise, the community spouse later obtains significant additional resources). *See* subsection (c)(4).

The Income Provisions

Subsections 1396r-5(b) and (d) provide rules for the treatment of income, generally insuring that the community spouse has a protected level of income. Subsection (b) protects *any* income of the community spouse from being deemed available to the institutionalized spouse during months of institutionalization, incorporating the "name on the check" principle with regard to the community spouse. Under these rules, the community spouse's income is not considered in determining the Medicaid eligibility of the institutionalized spouse. Subsection (b) also provides special rules for the "attribution of income" of the institutional spouse for purposes of post-eligibility income adjustments authorized under subsection (d).

Once eligibility is established, subsection (d) protects the community spouse by allowing the institutionalized spouse to allocate part of his or her income to the community spouse, when necessary, before any remainder must be used to defray the costs of his or her institutional care. Subsection (d)(3) provides for the computation of the community spouse's minimum monthly maintenance needs allowance (MMMNA or minimum monthly need), an amount which ensures that the community spouse has

income significantly above the poverty level. *See* subsection (d)(3)-(4). Subsection (d)(2) authorizes a deduction from the institutionalized spouse's income if necessary to meet the minimum monthly need, a deduction called the community spouse monthly income allowance (CSMIA or income allowance[5]). This is the amount by which the minimum monthly need exceeds the monthly income otherwise available to the community spouse.

Remedial Provisions

Remedial provisions for notice and fair hearing are contained in subsection 1396r-5(e). In general, either spouse is entitled to a fair hearing if either is dissatisfied with the determination of the income allowance, the monthly income otherwise available to that spouse, the spousal share of resources under subsection(c)(1), the attribution of resources under subsection (c)(2) or the determination of the resource allowance. *See* subsection (e)(2)(A).

Under subsection (e)(2)(B), the hearing officer is authorized to revise the minimum monthly need upward under certain "exceptional circumstances." Under subsection (e)(2)(C) – the portion of 42 U.S.C. § 1396r-5 particularly at issue here – the hearing officer is authorized to revise the resource allowance when the "community spouse's income" is less than the minimum monthly need. (Increasing the resource allowance means that the institutionalized spouse has to spend down less of his or her resources, which would then go to the community spouse. The additional resources the community spouse may retain earns income that enables him or her to meet the minimum monthly need.)

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[5]The acronyms for terms defined by the MCCA, including CSRA, CSMIA and MMMNA, are commonly used in the cases and are set forth here for that reason. For easier recognition, however, this petition will generally use the shortened word form rather than the acronym.

B. Wisconsin's "income first" policy.

Wisconsin law, consistent with 42 U.S.C. § 1396r-5(e)(2)(C), requires the hearing officer to increase the amount of the resource allowance at a fair hearing if either spouse establishes that the standard resource allowance does not generate sufficient income to bring the community spouse's income up to the minimum monthly need. *Cf. id.*; Wis. Stat. § 49.455(8)(d) (1995-96). In doing so, however, Wisconsin allows increases in the standard resource allowance for the purpose of generating additional income for the community spouse only *after* excess income from the institutionalized spouse is attributed to the community spouse. *See id.*[6] This policy, which Wisconsin has enacted by statute, *see* Wis. Stat. § 49.455(8)(d), is known as the "income first" rule.[7]

The "income first" approach is employed by thirty-five other states besides Wisconsin in their statutes, administrative rules or state Medicaid policies.[8] In effect, the

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[6]Institutionalized spouses generally must use their income for the costs of care except for a $40 monthly personal needs allowance. The excess income that Wisconsin attributes to the community spouse is, thus, income that would ordinarily be spent on institutional care.

[7]*See, e.g., Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 799-800 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 408; Ahmad, Omar N., "Medicaid Eligibility Rules for the Elderly and Long-Term Care Applicant," 20 Journal of Legal Medicine 251 at 660 (June 1999).

[8]According to a recent survey described by the state of New York in its Petition for Writ of Certiorari in *Novello v. Robbins*, No. 00-489 at 5 n.2 (filed September 28, 2000), quoted here by permission, the other "income first" states are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South

"income first" rule requires couples to use a greater portion of their resources for spending down on medical care, thereby postponing Medicaid eligibility. *See Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 805 (3d Cir.) ("*Cleary II*"), *cert. denied*, ___ U.S. ___, 120 S. Ct. 170 (1999).

Another group of states has adopted a "resource first" policy in the application of the fair hearing provisions of 42 U.S.C. § 1396r-5(e), as the Wisconsin Court of Appeals required in this case. Under the "resource first" approach, the institutionalized spouse is first permitted to transfer excess resources to the community spouse in order to generate additional income to raise his or her income to the monthly needs allowance. Only if the additional resources fail to do so does the institutionalized spouse transfer his or her excess income to the community spouse.[9] The effect of the

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Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. Only a handful of states have codified the "income first" policy in a statute or administrative rule. *See* Cal. Welf. & Inst. Code § 14006.4 (Deering, LEXIS through 2000 Supp., 1999 Sess.); Colo. Rev. Stat. § 26-4-506 (1999); 10 Colo. Code Regs. 2505-10, § 8.112.13 (1999); Md. Regs. Code § 10.09.24.10-1.F.(4) (1998); N.J. Admin. Code § 10:71-5.7(d) (2000); Or. Admin. R. 461-160-0580(1)(f)(D) (2000). Wis. Stat. § 49.455(8)(d) (1997-98). In most "income first" states, the policy is set forth in an administrative directive or policy manual, or simply represents the State Medicaid agency's interpretation of the "community spouse's income" within the meaning of 42 U.S.C. § 1396r-5(e)(2)(C). *See, e.g.,* Delaware Division of Social Services Medical Assistance Manual (DSSM) 20995.3.2 and 20970; Michigan Medicaid Program Administrative Manual, Item 600, p. 33; Minnesota Dept. of Human Services Health Care Programs Manual § 0909.25.05 (1998); South Carolina Department of Social Services Medicaid Policy Manual § 12.06. The *Novello* petition does not involve any question concerning the validity of the "income first" rule itself, which was not challenged in that case. *See* petition in No. 00-489 at 5. Rather, *Novello* raises the ancillary question whether the application of the "income first" rule to the institutionalized spouse's social security income violates the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a). *See* petition No. 00-489 at i.

[9]*See, e.g.*, 305 Ill. Comp. Stat. Ann. 5/5-4 (West 1998); Ill. Admin. Code, tit. 89, § 120.379 (West 2000); Mass. Gen. Laws ch. 118E,

"resource first" approach is to render the institutionalized spouse eligible for Medicaid much sooner without having to spend excess resources down to the ordinary resource limit.

Finally, still other states employ a hybrid approach, leaving to the hearing officer's discretion whether to consider any permissible income transfer before increasing the standard resource allowance.[10]

Policy statements issued by the Secretary of the Department of Health and Human Services (DHHS) and by its Health Care Financing Administration (HCFA), the federal agency responsible for administration of the Medicaid program, have expressly approved use of the "income first" approach, as well as other "reasonable interpretations" of the MCCA.[11]

C. Facts.

This case arose as a proceeding for judicial review under the Wisconsin administrative procedure act, of an administrative decision of the petitioner Department of Health and Family Services (Department). The undisputed facts are set forth in the decisions of the court of appeals and

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§ 21A(c) (West, WESTLAW through ch. 161 of 2000 2d Ann. Sess.); Mass. Regs. Code tit. 130, § 520.017(C) (2000). Both Massachusetts and Ohio formerly used an "income first" approach, but have switched to the "resource first" approach. *See Thomas v. Com'r, Div. of Med. Assistance*, 425 Mass. 738, 682 N.E.2d 874, 877 n.8 (1997) (noting statutory change); *Chambers*, 145 F.3d at 795; Ohio Admin. Code § 5101:6-7-02(C) (1999). *See generally Cleary v. Waldman*, 959 F. Supp. 222, 229-30 (D.N.J. 1997) ("*Cleary I*"), *aff'd*, *Cleary II*, 167 F.3d 801.

[10]*See Cleary I*, 959 F. Supp. at 229-30.

[11]*See* letter from DHHS Secretary Shalala to Ohio Governor Voinovich and a series of HCFA policy statements included in the Appendix to this petition at App. 78a-90a.

the hearing examiner (*see* App. 2a-3a, ¶¶ 2-4; *see also* App. 24a-26a).

Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for Medicaid. The Green County, Wisconsin, Department of Human Services conducted an asset assessment to determine whether Irene was eligible for Medicaid benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The county set Burnett's resource allowance at $72,822, or one-half of the couple's non-exempt assets. Based upon this resource allowance, the County established a total resource limit of $74,822—$72,822 for Burnett, as the community spouse, and $2,000 for Irene,[12] as the institutionalized spouse, before Irene would be eligible for Medicaid. On the date of Irene's Medicaid application, the couple had resources totaling $89,335. The County denied Irene's institutional Medicaid application because the Blumers were $14,513 above their resource limit of $74,822. *See* App. at 3a, ¶ 2. (Put another way, the Blumers had to spend another $14,513 in resources before Irene would be eligible.)

Irene requested a hearing for the purpose of setting a higher resource allowance. At the hearing, evidence established that Burnett's total monthly income was $1,702.45, including his social security income, an annuity and income from his resource share, which generated $377.85 per month in interest and dividends. This amount was about $25 below Burnett's minimum monthly need of

[12]Individual Medicaid applicants are subject to a resource limit of $2,000. *See* 20 C.F.R. § 416.1205. The $2,000 limit applied to Irene by operation of 42 U.S.C. § 1396r-5(a)(1).

$1,727 then established by state and federal law.[13] Irene herself had monthly income of $1,162.71. She argued that because the resource allowance set by the county did not have the capacity to generate sufficient income to meet Burnett's monthly need, the examiner should increase the resource allowance. Increasing the resource allowance would also have allowed Irene to transfer assets to Burnett, thus avoiding having to spend down her resources on the cost of her care and making her eligible for Medicaid almost immediately. *See* App. 2a-3a, ¶ 3.

Under the "income first" rule, however, the simple solution to Burnett's $25 monthly shortfall was to attribute $25 of Irene's monthly income to him. *See* subsection (d)(1)(B). Applying Wis. Stat. § 49.455(8)(d), the hearing examiner concluded that he could not raise the resource allowance unless that was still necessary after Irene first made her income available to him. Because attributing Irene's available income to Burnett fulfilled the minimum monthly need shortfall, the hearing examiner concluded that Burnett's resource allowance should not be increased and that the county correctly denied Medicaid benefits to Irene. *See* App. 3a, ¶ 4.

D. Judicial proceedings below.

The Circuit Court of Green County affirmed the Department's decision in all respects (*see* App. 19a-22a) and Irene appealed. The court of appeals reversed, holding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with 42 U.S.C. § 1396r-5(e)(2)(C). *See* App. 1a-2a, ¶ 1.

[13]The MMMNA in each state changes annually based on a statutory formula. *See* 42 U.S.C. § 1396r-5(d)(2)-(3). In Wisconsin, the current MMMNA is the lesser of $2,103 or $1,875 plus excess shelter expenses.

According to the court, 42 U.S.C. § 1396r-5(e)(2)(C) plainly and unambiguously requires the application of a "resource first" approach and does not permit the "income first" approach required by the Wisconsin statute. According to the state court, federal law requires that excess resources available to the institutionalized spouse be transferred to the community spouse to generate additional monthly income to make up the difference between the community spouse's personal income and the minimum monthly need *before* any available income possessed by the institutionalized spouse can be transferred to the community spouse (*see* App. 1a-2a, ¶ 1 and 7a-16a, ¶¶ 13-29).

The state court refused to give any deference to the informal views of either HCFA or the DHHS Secretary. According to the court, no deference is due because subsection 1396r-5(e)(2)(C) itself is plain and unambiguous (*see* App. 16a, ¶ 27).

The court below relied on two state intermediate appellate court decisions from Ohio decided in 1994. *See Kimnach v. Ohio Dept. of Human Serv.*, 96 Ohio App. 3d 640, 645 N.E.2d 825 (1994), *appeal not allowed*, 71 Ohio St. 3d 1447, 644 N.E.2d 409 (1995); *Gruber v. Ohio Dept. of Human Serv.*, 98 Ohio App. 3d 72, 647 N.E.2d 861 (1994), *appeal not allowed*, 71 Ohio St. 3d 1493, 646 N.E.2d 468 (1995). The court refused to give any weight to more recent federal and state decisions unanimously concluding that the "income first" approach is based on a reasonable interpretation of 42 U.S.C. § 1396r-5 as a whole. *See Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 802-04; *Cleary I*, 959 F. Supp. 222; *Thomas*, 682 N.E.2d at 879-81; and *Golf v. State Dept. of Social Services*, 91 N.Y.2d 656, 697 N.E.2d 555, 558-63 (1998).

The Department sought discretionary review by the Wisconsin Supreme Court on the federal question presented.

That court denied review in an order dated September 12, 2000 (*see* App. 18a).

REASONS FOR GRANTING REVIEW

The court of appeals itself clearly recognized that its interpretation of the federal Medicaid spousal impoverishment statute directly conflicts with the view of all of the federal courts which have addressed whether the "income first" approach is permissible under federal law. In addition, while the decision is consistent with two state intermediate appellate decisions from Ohio, it directly conflicts with decisions of the highest courts of New York and Massachusetts. *Cf.* Sup. Ct. R. 12(b). Further, the court of appeals' decision conflicts with the expressed views of the federal agency charged with implementing the statute.

This case presents a significant federal question concerning the scope of the states' discretion to administer the spousal impoverishment provisions of the federal Medicaid law in accordance with state attribution of income requirements. The "income first" policy is in effect in at least thirty-five other states besides Wisconsin. Its invalidation will have a significant fiscal impact on Wisconsin and federal Medicaid costs and, potentially, on other "income first" states as they struggle to control Medicaid costs while administering the program in a fair and equitable manner.

Finally, the court is wrong in regarding the federal spousal impoverishment statute as plain and unambiguous and in concluding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with 42 U.S.C. § 1396r-5(e)(2)(C).

ARGUMENT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE THIRD AND SIXTH CIRCUITS, DECISIONS OF THE HIGH COURTS OF NEW YORK AND MASSACHUSETTS AND THE VIEWS OF THE HEALTH CARE FINANCING ADMINISTRATION.

As the Wisconsin Court of Appeals recognized, its decision directly conflicts with federal and state precedent in the Third and Sixth Circuits and in the high courts of New York and Massachusetts (*see* App. at 9a-11a, ¶¶ 16-19). Those courts, as well as HCFA, have consistently rejected the reasoning of the court of appeals, recognizing that the spousal impoverishment provisions of the MCCA are complex, interlocking and ambiguous and that 42 U.S.C. § 1396r-5(e)(2)(C) cannot be interpreted without reference to § 1396r-5 as a whole or to the statutory policies the MCCA is intended to serve.

More significantly, each of these courts, together with HCFA, have rejected the result of the court of appeals, holding instead that 42 U.S.C. § 1396r-5(e)(2)(C) *permits* the application of the "income first" rule embodied in Wis. Stat. § 49.455(8)(d). *See Chambers*, 145 F.3d at 802 (holding that subsection (e)(2)(C) does not have a "plain meaning" that mandates a "resource first" approach); *Cleary I*, 959 F. Supp. at 232-34; *Cleary II*, 167 F.3d at 811-12 (deferring to views of HCFA and DHHS and holding that the state did not violate the MCCA by employing the "income first" approach in determining the Medicaid eligibility of an institutionalized spouse); *Golf*, 697 N.E.2d at 559-63 (MCCA is silent or ambiguous as to meaning of "community spouse's income" in subsection (e)(2)(C); "income first" method is based on a

reasonable interpretation of the statute and is consistent with the policies underlying the statute); *Thomas*, 682 N.E.2d at 879-81 ("income first" rule did not frustrate policy objectives of the MCCA; noting the unlikelihood that Congress would require the states to create an endowment to provide the community spouse with income and thereby immunize a substantial share of the institutionalized spouse's resources from having to pay for nursing home care). *But see Kimnach*, 645 N.E.2d at 629; and *Gruber*, 647 N.E.2d at 862-63 (concluding that the statute is unambiguous and forbids application of "income first" approach).

HCFA, the federal agency responsible for administration of the Medicaid program, has expressly indicated that Wisconsin and other states have discretion to employ "income first," unless and until HCFA itself implements an administrative rule which limits the states' discretion in this respect. *See* App. 84a-90a; *cf.* App. 78a-83a. This Court has long recognized that even informal policy interpretations by the agency charged with administration of a statute are entitled to some level of deference so long as they are informed, reasonable and persuasive. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Christensen v. Harris County*, ___ U.S. ___, 120 S. Ct. 1655, 1662-63 (2000).

Because of the statutorily required fair hearing process and the availability of judicial review under state administrative procedure acts, the validity of discretionary policies like "income first" are most frequently litigated in the state courts. When state courts refuse to accord any deference to the expressed views of the federal agency responsible for administration of the program or to recognize the persuasive value of federal appellate decisions directly on point, a state like Wisconsin has no recourse except in this Court.

II. WHETHER STATES HAVE DISCRETION UNDER THE MCCA TO EMPLOY AN "INCOME FIRST" POLICY IS A SIGNIFICANT FEDERAL QUESTION THAT WILL HAVE A SUBSTANTIAL FISCAL IMPACT ON WISCONSIN AND OTHER STATES EMPLOYING THAT POLICY.

Although the Medicaid Act imposes certain minimum and maximum benefits and requires states to meet various minimum standards, most benefits provided under the Act are optional and states are afforded a great deal of discretion in the manner in which their individual programs are implemented. Indeed, variance among individual state Medicaid programs is not only common but inherent in the Medicaid system.

The spousal impoverishment provisions of the MCCA are no exception to the rule that states ordinarily have great discretion in the manner in which they construct their individual state Medicaid plans. *See*, *e.g.*, 42 U.S.C. § 1396r-5(d)(3) (setting the minimum monthly need); *id.*, § 1396r-5(f)(2)(A)(i) (determining the resource allowance). Whether states have such discretion in the administration of the fair hearing provisions of 42 U.S.C. § 1396r-5(e) presents a significant federal question in how states administer their statewide Medicaid programs. If the states lack the authority to employ the "income first" approach, as the court below decided, the decision will require significant changes in the way Wisconsin and many other states have routinely administered the spousal impoverishment protections of the MCCA.

Requiring Wisconsin to abandon its "income first" approach and to adopt a "resource first" approach instead will also impose a substantial financial burden on both the state

and federal governments that has no basis in the competing policies the MCCA is intended to serve. Under the "income first" approach, Wisconsin attributes a median amount of about $992 each per month of each institutionalized spouse's income to the community spouse in order to provide the latter with income up to the minimum monthly need level. Employing "income first," couples typically are able to provide the community spouse with sufficient income to meet the minimum monthly need, while the institutionalized spouse is required to spend excess resources above the total of the resource allowance and the limited amount the institutionalized spouse is allowed to keep. Under the "income first" policy, then, Wisconsin is able both to provide community spouses with adequate income to meet the minimum monthly need and to maintain rough equity in the maximum amount of resources which are protected for the community spouse, consistent with the standard resource allowance.

If excess resources must be transferred to the community spouse before income (as the "resource first" approach requires), the institutionalized spouse will become eligible for Medicaid much earlier without being required to spend excess resources down to the level normally required under the spousal impoverishment provisions of the MCCA.

Not only does this create inequities among Medicaid recipients, the additional state and federal costs to the Medicaid program will be significant. If Wisconsin cannot attribute a median income of $992 monthly for the support of the community spouse, as it now does in spousal impoverishment cases, the resulting fiscal impact will be substantial because a large amount of resources must be

transferred from the institutional spouse in order to generate income of $992 monthly or $11,928 annually.[14]

The petitioner Department estimates that, based on the current cost of institutional care, the total additional cost to the Medicaid program *per month* for each new case in which the state must use the "resource first" approach would be about $2,000. Based on an estimated average of 50 months of nursing home care per case, the total state and federal cost for every 100 new cases would be approximately $10 million.[15] The state's share would be approximately $4 million or 40% of that total. The total number of new cases and the resulting costs will be correspondingly higher if, as anticipated, elder law practitioners adjust financial planning strategies in response to the *Blumer* decision.

If followed by other states, both the state governments and the federal government would be subjected to substantially increased Medicaid costs.

[14]Resources valued at approximately $340,000 are necessary to generate monthly income of $992, assuming a 3.5% rate of return. Resources of approximately $300,000 are required to generate the same amount of income, assuming a 4% rate of return. Thus, using resource first, an institutionalized spouse having as much as $340,000 or more in excess resources could become immediately eligible for Medicaid if his or her community spouse has income typical of other Wisconsin community spouses.

[15]The estimate is based on a cost per 100 cases because it was not possible to estimate the number of new cases that will arise per year.

III. THE COURT BELOW WAS WRONG: THE "INCOME FIRST" POLICY IS BASED ON A REASONABLE INTERPRETATION OF 42 U.S.C. § 1396r-5.

Subsection 1396r-5(e)(2)(C) is one brief subsection of the long and complex spousal impoverishment statute, 42 U.S.C. § 1396r-5. This provision authorizes the hearing officer to supplement the standard resource allowance with additional resources when the standard allowance does not raise "the community spouse's income" to the minimum monthly need level. "Community spouse's income" is not otherwise defined, in contrast to other carefully defined terms like the minimum monthly need (MMMNA), the resource allowance (CSRA) or the income allowance (CSMIA). Subsection (e)(2)C) does not, for example, indicate whether the term "community spouse's income" is restricted to his or her individual income or whether it may include income from the institutionalized spouse. Yet the statute itself expressly contemplates attribution of the institutional spouse's available income to the community spouse as a means of ongoing support. *See* subsection 1396r-5(d).

Nowhere does subsection (e)(2)(C) preclude or forbid the "income first" approach of attributing the institutional spouse's income to the community spouse in order to raise the latter's monthly income level. Rather, subsection (e)(2)(C) is "entirely silent" on this point. *See Golf*, 697 N.E.2d at 558. Moreover, the subsection does not expressly require a "resource first" approach, although the Senate version of the bill, not finally enacted, contained such a provision. *See* H.R. Conf. Rep. No. 100-661, at 263-65, *reprinted in* 1988 U.S.C.C.A.N. 1041-43.

Despite this, the court below, looking at subsection 1396r-5(e)(2)(C) in isolation, concluded that the meaning of that provision was clear and then interpreted the

remainder of 42 U.S.C. § 1396r-5 to fit what it saw as the clear meaning of the former. The court's approach turns the ordinary process of statutory interpretation on its head, reversing the normal order for discerning the meaning of a statute as a whole.

The first step in determining the proper construction of the federal statute is to examine its text. *See Negonsott v. Samuels*, 507 U.S. 99, 104-05 (1993) ("we begin with the text of" the act). Although the issue in this case focuses on the interpretation of 42 U.S.C. § 1396r-5(e)(2)(C), "a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citation omitted); *cf. National Labor Relations Board v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). Accordingly, a court must first analyze how subsection (e)(2)(C) fits into § 1396r-5 as a whole in order to determine whether that provision is susceptible to a single plain reading or not.

The better view, consistent with the federal and state high courts which have analyzed subsection (e)(2)(C) in the context of the statute as a whole, is that subsection (e)(2)(C) is ambiguous. *See* cases described at 16-17 above. *See also Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (conflict between court decisions alone suggests statute is ambiguous).

The second error infecting the decision of the court below is that the court refused to give any deference whatever to the interpretation of 42 U.S.C. § 1396r-5 by the federal and state agencies responsible for administration of the Medicaid program, based on the court's insistence that subsection (e)(2)(C) has a plain meaning. But the court's reasoning on that point is fundamentally flawed, as discussed above. Moreover, who has a more informed position from which to evaluate in the first instance whether provisions of a notoriously complex set of federal statutes like the Medicaid Act, or the spousal impoverishment statute in particular, has a plain meaning or not, than the administrative agencies charged with their administration? *Cf. Cleary II*, 167 F.3d at 811-13 (HCFA and DHHS policy statements are reasonable and consistent with the language and purposes of the MCCA and thus entitled to deference).

CONCLUSION

For the reasons discussed above, this Court should issue a writ of *certiorari* to review the decision of the Wisconsin Court of Appeals, District IV.

Respectfully submitted,

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December 2000

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COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2000

No. 99-1053

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

IRENE BLUMER,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF HEALTH AND
FAMILY SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed and cause remanded with directions for further proceedings consistent with this opinion.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Irene Blumer appeals from a decision of the Department of Health and Family Services (DHFS) to deny her Medical Assistance (MA) benefits. Irene claims the hearing examiner erred in applying the "income-first" rule instead of the "resource-first" rule

when determining whether to increase the community spouse resource allowance. The hearing examiner's decision was based on a provision found in the Wisconsin Statutes but not contained in federal law. Because we conclude that Wisconsin's income-first rule impermissibly conflicts with federal law, we reverse.

BACKGROUND

¶2 The facts of this case are not in dispute. Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for MA. The Green County Department of Human Services conducted an asset assessment to determine whether Irene was eligible for MA benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The County set Burnett's community spouse resource allowance (CSRA) at $72,822, or one-half of the couple's non-exempt assets. Based upon this CSRA, the County established a total asset limit of $74,822-$72,822 for Burnett, as the community spouse, and $2,000 for Irene, as the institutionalized spouse, before Irene would be eligible for MA. The County then examined the current total assets of the couple as of the date the application for MA was made and concluded that the couple had assets of $89,335. The County denied Irene's MA application because the Blumers were $14,513 above their asset limit of $74,822.

¶3 Irene requested a hearing for the purpose of setting a higher CSRA. At the hearing, it was established that Burnett's share of assets generated $377.85 per month in interest and dividends. Combined with his social security payments and those from an annuity which Burnett held, the hearing examiner concluded that Burnett's total monthly income was $1,702.45. This amount is below the minimum monthly maintenance needs allowance (MMMNA) of $1,727 established by federal law, as the minimum monthly income

a community spouse would need to live independently. *See* 42 U.S.C. 1396r-5(d)(3) (1994).[1] Irene argued that because the CSRA set by the County did not have the capacity to generate sufficient income to meet Burnett's MMMNA, the examiner should have set a higher CSRA so that Burnett would have more assets to generate more income. Setting a higher CSRA would allow a transfer assets to Burnett, thereby making Irene eligible for MA sooner.

¶4 Based on WIS. STAT. § 49.455(8)(d) (1995-96),[2] the hearing examiner concluded that he could not raise the CSRA, thereby permitting a transfer of assets to Burnett until Irene first made all of her income available to him. By imputing Irene's social security retirement income and her pension to Burnett, the hearing examiner concluded that he had a monthly income of more than $2,000, well above the MMMNA established by federal statute. Therefore, the hearing examiner determined that no additional assets above the initially established CSRA needed to be retained by Burnett, the community spouse, and that the County correctly denied MA benefits to Irene. Irene petitioned the circuit court for review, which affirmed the agency's decision in all respects. Irene appeals.

DISCUSSION

Standard of Review.

¶5 In an appeal of an administrative agency decision, we review the decision of the agency, not that of the circuit court. *See* ***Lilly v. DHSS***, 198 Wis. 2d 729, 734, 543 N.W.2d 548, 550 (Ct. App. 1995). The interpretation

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[1] All references to the United States Code are to the 1994 version. The sections pertinent to this opinion were not substantially changed from 1994 to 1996, when the application for benefits was made.

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

and application of WIS. STAT. § 49.455 and 42 U.S.C. § 1396r-5 to undisputed facts are conclusions of law. *See* ***Gordon v. State Med. Examining Bd.***, 225 Wis. 2d 552, 556, 593 N.W.2d 481, 483 (Ct. App. 1999), *review denied*, ___ Wis. 2d ___, 599 N.W.2d 409 (1999). Although we are not bound by an agency's conclusions of law, in certain instances, we give an agency's conclusions one of three standards of deference: (1) great weight deference; (2) due weight deference; or (3) no deference. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). However, an administrative interpretation "'is only of significance where there is an ambiguity in the statute. It cannot overcome the plain wording of a statute where there is no ambiguity.'" ***Lincoln Sav. Bank, S.A. v. DOR***, 215 Wis. 2d 430, 443, 573 N.W.2d 522, 528 (1998) (citation omitted).

¶6 DHFS argues that its interpretation of the applicable statutory provisions is entitled to, at minimum, due weight deference because it has interpreted the state and federal medical assistance statutes for more than a decade. Irene points out, however, that she does not contend that DHFS is misinterpreting a provision in the law. Instead, she argues that the state provision relied upon by DHFS to deny her benefits directly conflicts with federal law, which it may not do. *See* 42 U.S.C. § 1396a(a)(17)(A); ***Schweiker v. Gray Panthers***, 453 U.S. 34, 37 (1981). When the matter was before the hearing examiner, it did not undertake any analysis of federal law, but simply denied the benefits because of WIS. STAT. § 49.455(8)(d). Therefore, we agree with Irene that it is not the agency's interpretation of a statute that is at issue; but rather, whether the state statute conflicts with federal law. Accordingly, we conclude that the appropriate standard of review is *de novo*.

Overview of Medical Assistance.

¶7 Medical Assistance, also known as Medicaid, is a joint federal-state program that was established in 1965 as Title XIX of the Social Security Act. In addition to other benefits, the program provides coverage for elderly persons whose income and resources are insufficient to meet the costs of medical services, such as nursing home care. For states that participate in the program, such as Wisconsin, the federal government provides partial funding and establishes mandatory and optional categories of eligibility and services covered. Although states are given wide latitude to adopt standards for determining the extent of MA, no state may adopt programs or policies that violate a mandate of the Act. *See 42* U.S.C. § 1396a(a)(17)(A); ***Schweiker***, 453 U.S. at 37.

¶8 In 1988, Congress enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA). *See* 42 U.S.C. § 1396r-5. The MCCA sought to protect married couples where one spouse was institutionalized in a nursing home; so that the spouse who continued to reside in the community was not impoverished and had sufficient income and resources to live independently. *See* H.R. REP. NO. 100-105(II), at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888. Prior to 1988, the medical assistance eligibility rules required a couple to deplete their resources before the institutionalized spouse was eligible for benefits. This process often left the community spouse impoverished and unable to live without public assistance.

¶9 The MCCA was designed to govern the calculation of both resources and income allocable to each spouse for purposes of Medicaid eligibility. It treats resources and income differently, and both need to be evaluated when determining whether an applicant is eligible for MA benefits. The term, "resources," is roughly equivalent to assets, while income corresponds to the

income-generating potential of those assets and to additional income such as social security or pension payments.

¶10 When an application for MA is made, the couple's total resources are calculated as of the date that continuous institutionalization began for the institutionalized spouse, and then a share of those resources is allocated to each spouse.[3] The amount of resources allocated to the community spouse is called the community spouse resource allowance (CSRA). The CSRA is considered an unavailable asset in determining the MA eligibility of an institutionalized spouse.

¶11 When an application for MA is made, in addition to the CSRA, a community spouse is entitled to income in an amount sufficient to meet the minimum monthly maintenance needs allowance (MMMNA). *See* 42 U.S.C. § 1396r-5(d)(3); WIS. STAT. § 49.455(4). The MMMNA is designed to ensure that, if possible, the community spouse will have income (as opposed to resources) above the poverty level.[4] Both federal and state statutes incorporate the "name on the check" principle, whereby at the time an application for MA is made, income is considered available only to the spouse in whose name the payment is made. *See* 42 U.S.C. § 1396r-5(b); § 49.455(3)(b). Payment made in the name of both spouses is equally divided, initially.

¶12 If either spouse is dissatisfied with the CSRA as set by the County, or if the community spouse's income is

[3] Federal law requires that the asset assessment be conducted as of the date that continuous institutionalization began, not the date on which the application for MA was made. *See* 42 U.S.C. § 1396r-5(c)(1)(A).

[4] At the time of Irene's application, the MMMNA, as established by federal statute, was 150% of the federal poverty line, which was $1,727 per month.

insufficient to meet the MMMNA, he or she may request a fair hearing. *See* 42 U.S.C. § 1396r-5(e); WIS. STAT. § 49.455(8). Section 49.455(8)(d) of the Wisconsin Statutes is critical to this appeal because it requires a hearing examiner to first impute all of the institutionalized spouse's income to the community spouse (income-first) if the community spouse's income is insufficient to meet the MMMNA, as opposed to transferring more of the couple's income-generating assets to the community spouse (resource-first) in order for that spouse to have sufficient income-generating capacity to meet the MMMNA.

The Blumers' Application.

¶13 When income in Burnett's name was combined with the income-generating capacity of Burnett's CSRA, he had insufficient income to meet the MMMNA. The central issue in this case is whether the income-first approach, used by the hearing examiner to supplement Burnett's MMMNA is in conflict with federal law. The federal provision at issue is found at 42 U.S.C. § 1396r-5(e)(2)(C) and it provides:

> **Revision of community spouse resource allowance.** If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

¶14 Wisconsin's provision relative to requesting a new CSRA as established by a fair hearing is similar to the federal provision and it provides:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

WISCONSIN STAT. § 49.455(8)(d). However, part of subsection (8)(d) is not found in federal law. It states:

> Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b), unless the institutionalized spouse makes all of his

> or her income . . . available to the community spouse . . .

Therefore, by enacting subsection (8)(d), the Wisconsin legislature mandated that DHFS adopt an income-first approach instead of a resource-first approach in determining whether to raise a community spouse's CSRA.

¶15 Irene contends that when an application for MA is made, the plain language of the federal statute directs a state to increase the CSRA if the community spouse has income that is insufficient to meet the MMMNA. Therefore, Irene argues that WIS. STAT. § 49.455(8)(d), which requires the hearing examiner first to impute the institutionalized spouse's income to the community spouse, contravenes federal law and is invalid. She cites out-of-state cases which have so held. ***See Gruber v. Ohio Dep't of Human Servs.***, 647 N.E.2d 861 (Ohio Ct. App. 1994); ***Kimnach v. Ohio Dep't of Human Servs.***, 645 N.E.2d 825 (Ohio Ct. App. 1994).

¶16 DHFS contends, on the other hand, that the federal spousal impoverishment provisions found in 42 U.S.C. § 1396r-5 are ambiguous and that, while income-first is not mandated under federal law, it is permissible. In support of its contention, the DHFS relies on its interpretation of the legislative history underlying these provisions and some of the informal interpretations of the federal agency charged with administering Medicaid. DHFS also cites several out-of-state cases in which courts have declared that the federal statute is ambiguous. *See, e.g.*, ***Cleary v. Waldman***, 959 F. Supp. 222, 228-29 (D.N.J. 1997) (***Cleary I***); ***Cleary v. Waldman***, 167 F.3d 801, 807 (3d Cir. 1999) (***Cleary II***), *cert. denied*, 120 S. Ct. 170 (1999); ***Chambers v. Ohio Dep't of Human Servs.***, 145 F.3d 793, 802 (6th Cir. 1998), *cert. denied*, 525 U.S. 964 (1998); ***Golf v. New York State Dep't of Soc. Servs.***, 697 N.E.2d 555, 556-57 (N.Y. 1998).

¶17 When we construe a statute, our aim is to ascertain the intent of the legislative body. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language chosen. *See* ***id.*** "If the language employed is clear and unambiguous, that is conclusive of legislative intent. Our inquiry ends, and we must apply the plain meaning of the statutes to the facts of this case." ***Cemetery Servs., Inc v. Department of Regulation & Licensing***, 221 Wis. 2d 817, 825, 586 N.W.2d 191, 195 (Ct. App, 1998), *review denied*, 225 Wis. 2d 488 (1999). Only if a statutory provision is ambiguous do we resort to rules of statutory construction, such as legislative history, to determine legislative intent. *See* ***J.A.L. v. State***, 162 Wis. 2d 940, 962, 471 N.W.2d 493, 502 (1991). Additionally, a statute is not rendered ambiguous merely because the parties disagree as to its meaning. *See* ***State v. Orlik***, 226 Wis. 2d 527, 534, 595 N.W.2d 468, 472 (Ct. App. 1999). And, legislative history may not be used to create an ambiguity in otherwise plain statutory language. *See* ***Johnson v. County of Crawford***, 195 Wis. 2d 374, 383, 536 N.W.2d 167, 170 (Ct. App. 1995).

¶18 DHFS does not articulate why or how it believes 42 U.S.C. § 1396r-5(e)(2)(C) is ambiguous. Instead, it points to out-of-state cases which have examined the issue before us and have concluded subsection (e)(2)(C) of the federal statute is ambiguous. A close review of those cases, however, reveals that the courts have stated their conclusions in broad strokes, such as opining that the spousal impoverishment provisions are complex; and therefore, it is impossible to attach a plain meaning to any provision. While we may agree that these provisions are complex, we cannot agree that every provision is ambiguous simply because of the complexity of the statute as a whole.

¶19 Additionally, some courts, in reasoning that the statute is ambiguous, have seized upon the phrase "community spouse's income" in 42 U.S.C. § 1396r-5(e)(2)(C) because that term is not specifically defined in the statute. They have concluded that it is reasonable to interpret "community spouse's income" as an amount that includes the imputation of income paid in the name of the institutionalized spouse. Based upon DHFS's citation of these cases, we view its assertion of ambiguity as a contention that the phrase, "community spouse's income," is ambiguous. We disagree.

¶20 First, the language of 42 U.S.C. § 1396r-5(e)(2)(C) mandates that if either spouse establishes that the CSRA is inadequate (in relation to the amount of income it has the capacity to generate) to raise the community spouse's income to the level of the MMMNA, there shall be substituted a higher CSRA: "there shall be substituted, for the community spouse resource allowance under (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance." This language very specifically directs the increase of the CSRA to an amount sufficient to generate additional income to meet the MMMNA. There is no direct or specific language that imputation of the institutionalized spouse's income should occur before raising the CSRA. Further, the language of the statute speaks of "the *community spouse's* income," not the couple's income or the community spouse's income plus the institutionalized spouse's income. This is consistent with the separate treatment of each spouse's income throughout § 1396r-5. Therefore, we conclude that the specific language of the statute contemplates that the hearing examiner will separate the community spouse's income from that of the institutionalized spouse's and consider only the community spouse's income in its review of whether the CSRA that has been established is sufficient to avoid impoverishment of the community spouse.

¶21 Additionally, the CSRA is established only when the application of the institutionalized spouse is reviewed for MA eligibility. The statute provides that either spouse may request a hearing "if an application for benefits . . . has been made . . . ." *See* 42 U.S.C. § 1396r-5(e)(2)(A). Therefore, establishing the CSRA is a *pre-eligibility* determination, not a *post-eligibility* one. However, § 1396r-5(d)(1) directs the institutionalized spouse to transfer income to the community spouse *after* eligibility has been determined, not before eligibility bas been established. Section 1396r-5(d)(1) provides:

> **Protecting income for community spouse. (1) Allowances to be offset from income of institutionalized spouse.** *After an institutionalized spouse is determined . . . to be eligible for medical assistance,* . . . there shall be deducted from the spouse's monthly income . . . [a] community spouse monthly income allowance . . . but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(Emphasis added.) The community spouse monthly income allowance (CSMIA) is defined as the amount by which a community spouse's income is insufficient to meet the MMMNA. *See* § 1396r-5(d)(2). Stated another way, § 1396r-5(d) directs the institutionalized spouse to transfer income to the community spouse if the community spouse's income falls short of the MMMNA and relief for the community spouse was not available by permitting an increase in the CSRA because there were insufficient resources to generate the needed income.

¶22 The transfer referenced in 42 U.S.C. § 1396r-5(d)(1), however, occurs *after* the institutionalized spouse has been determined eligible for MA. *See* § 1396r-5(d)(1). And as stated earlier, this transfer of income is unrelated to revising the CSRA, which occurs *prior* to a determination of eligibility. Because § 1396r-5(d) (relating to transferring income) is limited to post-eligibility determination transfers, while increasing the CSRA pursuant to § 1396r-5(e)(2)(C) is not so limited, then increasing the CSRA via resources is the only method by which a community spouse can be afforded more income for the MMMNA at the time MA eligibility is being determined for the institutionalized spouse. *See* ***Gruber***, 647 N.E.2d at 868-69 ("Since the MMMNA must be met, and since Section 1396r-5(e)(2)(C) provides the only method to meet the MMMNA, the agency has no choice but to transfer over the amount of resources that is necessary to raise [the community spouse's] income level to meet the MMMNA").

¶23 Furthermore, DHFS's contention that the community spouse's income includes imputed income from the institutionalized spouse would require us to conclude that while Congress so clearly provided for the transfer of income from an institutionalized spouse to a community spouse after a determination of eligibility, it also meant to do so prior to a determination of eligibility simply by using the phrase, "community spouse's income." Such a reading is inconsistent with the care with which Congress specified whose income or resources were addressed in the other subsections of the statute. Additionally, in many instances, DHFS's interpretation would make 42 U.S.C. § 1396r-5(d)(1) superfluous because all possible transfers of income available to meet the community spouse's MMMNA would have occurred prior to a determination of eligibility and there would be nothing left to transfer after eligibility, the period of time specifically referenced in (d)(1). Therefore, we conclude that construing the term, "community spouse's income," to include a pre-eligibility transfer of income from

the institutionalized spouse is contrary to the plain meaning of § 1396r-5(e)(2)(C). We also conclude that subsection 5(d)(1) provides for a shifting of income to the community spouse after eligibility has been determined when, even though all of the couple's assets have been transferred to the community spouse, that spouse still does not have sufficient income-generating capacity to reach the MMMNA.[5]

¶24 Finally, the transfer of the couple's resources such that the community spouse's income will meet the MMMNA is consistent with the objectives of the spousal impoverishment provisions of the Act, *i.e.*, to assure that the community spouse will have income and resources sufficient to live independently of the institutionalized spouse, without other forms of public assistance, if it is possible to do so. However, under the income-first approach requested by DHFS, a community spouse, like the one in this case, would become dependent upon income from the institutionalized spouse in order to meet his or her minimum monthly needs. Because that community spouse would be receiving income from the institutionalized spouse, more of the couple's resources would be spent down on the cost of nursing home care. However, if the institutionalized spouse dies first, the income that the community spouse receives from the institutionalized spouse would cease. Thereafter, the community spouse would be left with income that is, by default, less than the MMMNA set by federal statute (because otherwise, the institutionalized spouse would not have transferred income to the community spouse). In short, once the institutionalized spouse dies, under the income-first

[5] That type of situation is likely to occur when a homemaker who has not worked outside of the home becomes a community spouse, thereby having very little income in his or her name alone, and as a couple, there are few assets. In order to avoid impoverishment, such a spouse then may require a transfer of both resources and income from the institutionalized spouse in order to meet the community spouse's MMMNA.

rule, a community spouse will be left impoverished, without either the assets or the income necessary to assure independence.

¶25 However, under the resource-first rule, a community spouse may receive more of the couple's income-generating assets. Thereafter, if the institutionalized spouse dies, the community spouse continues to have resources to use for self-support. This furthers the purpose behind the spousal impoverishment provisions of the MCCA--to allow the community spouse to live independently. Congress knew that to take all of the community spouse's assets to pay for the institutionalized spouse's nursing home care would be short-sighted, because the community spouse would need to turn to other public assistance programs to survive once the institutionalized spouse died. And, reliance on public assistance by the community spouse had been a result of spousal impoverishment, which the MCCA sought to change.

¶26 We are also unpersuaded by other arguments made by DHFS. For example, DHFS urges us to consider the legislative history of the spousal impoverishment provisions because it believes that the legislative history supports an income-first approach. However, we do not look at the legislative history of a statute unless we conclude that it is ambiguous. *See* ***J.A.L.***, 162 Wis. 2d at 962, 471 N.W.2d at 502. Additionally, as stated above, legislative history may not be used to create an ambiguity in otherwise plain statutory language. *See* ***Johnson***, 195 Wis. 2d at 383, 536 N.W.2d at 170.[6] Because we conclude the statute is unambiguous, we cannot examine the legislative history.

[6] Additionally, we note that opponents of the income-first rule point to the same legislative history for support of their claim that a resource-first approach is mandated. The legislative history is, at best, inconclusive.

¶27 Similarly, DHFS also asks us to consider several letters from the United States Department of Health and Human Services (DHHS), the federal agency charged with administering the Medicaid program. However, we do not look to other sources to interpret a statute if its language is clear on its face. Additionally, we note that DHHS has not interpreted the statute consistently.

¶28 Finally, DHFS argues that while one of the chief purposes of the MCCA was to end spousal impoverishment, another purpose was to limit the use of public funds to support the institutionalized care of those who could afford to pay for their health care. DHFS contends that a resource-first rule allows couples to shelter excessive amounts of assets. However, this argument ignores 42 U.S.C. § 1396r-5(e)(2)(C) which places a ceiling on the amount of resources a hearing officer can transfer to the CSRA. The examiner may transfer no more than the amount of resources necessary to provide the community spouse with a MMMNA, which is set at 150% of the federal poverty line. *See* § 1396r-5(d)(3). The transfer of resources before income does not permit a community spouse to live a lavish lifestyle while the government pays for his or her spouse's nursing home care.

CONCLUSION

¶29 Because we conclude that Wisconsin's income-first rule set out in WIS. STAT. § 49.455(8)(d) impermissibly conflicts with federal law, we reverse the order of the circuit court and direct it to remand this matter to DHFS to increase Burnett's CSRA to an amount, when combined with Burnett's other income, which will permit him to have an income-generating capacity sufficient to meet the MMMNA.

By the Court.—Order reversed and cause remanded with directions for further proceedings consistent with this opinion.

Recommended for publication in the official reports.

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To: September 12, 2000

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You are hereby notified that the Court has entered the following order:

No. 99-1053 *Blumer v. Wis. DHFS* L.C.#97CV141

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-respondent-petitioner, Wisconsin Department of Health and Family Services, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN GREEN COUNTY
CIRCUIT COURT

IRENE BLUMER,

Petitioner,

Case No. 97-CV-0141

v.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Respondent.

JUDGMENT

The above action having come on for hearing before the court, petitioner, Irene Blumer, having appeared by the Elder Law Center of the Coalition of Wisconsin Aging Groups by Mitchell Hagopian; and respondent, Wisconsin Department of Health and Family Services, having appeared by James E. Doyle, Attorney General, and Leonard Martin, Assistant Attorney General; and the court having considered the matter upon the record and the written and oral arguments of the parties, and having on the 11th day of November 1998 orally issued its decision, now, on motion,

IT IS ORDERED AND ADJUDGED that for the reasons set forth in the court's oral ruling of November 11, 1998, the orders of the Wisconsin Department of Health and Family Services, dated June 10 and July 12, 1997 ultimately

concluding that Irene Blumer was ineligible for medical assistance due to excess assets be, and the same hereby are, in all respects affirmed.

Dated this 15th day of February 1999.

By the Court:

/s/
James R. Beer
Circuit Judge

THE COURT: I'm assuming you're ready for a decision.

MR. HAGOPIAN: Yes, your Honor.

MR. MARTIN: Yes, your Honor.

THE COURT: The Court would first state it is not difficult to be sympathetic to Ms. Blumer in this matter. And I think both counsel have written excellent briefs and argued well their points.

This becomes a decision basically down to whether or not the State of Wisconsin in drafting its statutes actually violated the federal statutes creating a program.

We haven't entered into whether or not the prior hearing examiner, anyway in argument, had any deficiencies in his findings from not taking sufficient evidence or anything such as that. That is not involved here.

We have such a small amount of increase, that I can't help but be troubled about that. It's clear that the Wisconsin statutes require that the institutionalized spouse make available to the impoverished spouse their income.

You can look at this several ways, and there are certainly times when those amounts far exceed the needs for care and times when they don't exceed the need for care but that a standard had to be set by the State of Wisconsin.

Now, is that standard that they set in conflict in any way with not only the statutes themselves but the intent of the statutes?

And as to that, I am not convinced from what I have read and seen and been provided for the Court to find differently because it's clear, as stated on page 12 of

Mr. Martin's brief, "that the language of the federal statute is not clear enough or unambiguous enough to conclude that there is any absolute prohibition at work in this matter."

Therefore, I think that the only remedy that this Court has is to uphold the finding of the hearing examiner and deny petitioner's request.

Mr. Martin, you will draft an order, submit it on to counsel, and I'll sign the same.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of

Irene G. Blumer
c/o Attorney Scott Thompson
P.O. Box 53566
Monroe, WI 53566

DECISION

MED-23/12842

PRELIMINARY RECITALS

Pursuant to a petition filed February 20, 1997, under sec. 49.45(5), Wis. Stats., to review a decision by the Green County Dept. of Human Services to deny an application for Medical Assistance (MA), a hearing was held on April 29, 1997, at Monroe, Wisconsin. A hearing set for March 18, 1997 was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner is eligible for MA due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST: Petitioner:
Irene G. Blumer
c/o Attorney Scott Thompson
P.O. Box 53566
Monroe, WI 53566
By: Attorney Scott Thompson

Wisconsin Department of Health and Family Services
Bureau of Welfare Initiatives
1 W. Wilson St., Room 350
P.O. Box 7851
Madison, WI 53707-7851
By: David Lousy, ESS1
Green County Dept. of Human Services
Pleasant View Annex,
P.O. Box 216
Monroe, WI 53566

EXAMINER: Kenneth P. Adler, Attorney
Division of Hearings & Appeals

FINDINGS OF FACT

1. The petitioner (SSN 387-36-0075; CARES No. 5105303954) is a married resident of Green County. She was admitted to a nursing home on November 17, 1994.

2. On December 31, 1996 the petitioner, through her husband, Burnett Blumer, applied for institutional Medical Assistance (MA) benefits.

3. Following application, an asset assessment was completed to determine what assets the couple had at the time of the petitioner's admission to the nursing home. The asset assessment, completed in January, 1997, indicated the petitioner and her spouse had total countable assets of $145,644 in November 17, 1994.

4. The community spouse asset share (CSAS) was computed at $72,822 with the total asset limit established at $74,822.

5. During January and February the couple's total countable assets remained above the $74,822 asset limit. On February 11, 1997 the couple's total countable assets were $89,335.30 (CSAS = $87,335.30; petitioner's share - $2,000) - or $14,513.30 above the asset limit. Exhibit 1

6. On February 12, 1997 the Client Assistance for Reemployment and Economic Support (CARES) system issued a notice of decision stating institutional MA had been denied effective 03/01/97 as "countable assets exceed limits." There was no discussion of the total combined assets of the couple, the maximum total assets the couple could retain, nor the amount by which that limit was exceeded. Exhibit 2

7. The petitioner has the following income:

Social Security		$ 926.99
Pension		$ 335.72
Less:	Medicare Insurance ($60)	
	Personal Allowance ($40)	
		$1,162.71

The community spouse has the following income:

Social Security	$1,015.15
New York Life Annuity	$ 309.45
Dividends/Interest	$ 377.85
	$1,702.45

* Dividends/Interest

New York Life Annuities . .	$214.05	
Checking NOW Account. . .	$ 7.05	
First Federal C.D.	$ 42.44	
First Banking Center C.D. .	$ 26.53	
Main Stay	$ 87.78	$ 377.85*

DISCUSSION

The issue in this case concerns the MA eligibility of the petitioner based upon spousal impoverishment guidelines concerning both: **(1)** a couple's "asset allowance" determined using the Community Spouse Asset Share (CSAS) and **(2)** allowable monthly income determined by the "minimum monthly maintenance needs allowance". The question is whether an institutionalized individual initially determined ineligible for MA based upon assets exceeding the spousal impoverishment asset allowance may subsequently be found eligible through the fair hearing process if those assets are required to generate income for a community spouse to reach the minimum monthly needs allowance as established by statute.

The petitioners applied for MA in December, 1996. At that time the county agency correctly completed an asset assessment of the couple's assets at the time the petitioner was institutionalized in November, 1994. After determining the couple had approximately $145,644 in assets during November, 1994 the county agency calculated an asset allowance of $72,822. A review of eligibility during January, 1997 indicated the couple remained above that asset allowance, with $88,670 in assets - still $15,848 above the asset allowance determined by the county agency. Therefore, the county continued to deny the application.

Technically the county correctly processed the application. However, the petitioners appealed the asset

allowance determination, arguing the allowance did not correctly reflect the assets available, and even if it did, the monthly income received by Mr. Blumer was not at the level of the minimum monthly maintenance needs allowance. The petitioners explained the assets, though exceeding the asset allowance, are generating a reasonable rate of interest and should be allowed to continue to do so in order to provide monthly income. Therefore the petitioners requested the amount of assets allowed to be retained by the community spouse be increased above the asset allowance to allow Mr. Blumer to retain the assets in order to generate income to raise his monthly income amount to the minimum monthly maintenance needs allowance of $1,727.

I. LEGAL BACKGROUND

The federal Medicare Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. Sec. 49.455(3), Wis. Stats.

The MCAA also established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is simply the amount of income considered necessary to maintain the community spouse in the community. A community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Sec. 49.455, Wis. Stats.

II. MA HANDBOOK PROVISIONS

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are instructed to review the combined assets of the institutionalized spouse and the community spouse. *MA Handbook*, Appendix 23.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the "community spouse asset share", or asset limit, to determine eligibility.

MA Handbook, Appendix 23.4.1., explains the eligibility determination process: First, a Community Spouse Asset Share (CSAS) is calculated as follows: **(1)** If the couple's total countable assets are $153,480 or more, the Community Spouse Asset Share (CSAS) is $79,020; **(2)** If the couple's total countable assets are less that $153,480 but greater than $100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are $100,000 or less, the CSAS is $50,000. Sec. 49.455(6)(b)3, Wis. Stats. *MA Handbook*, Appendix 23.4.2.

Second, $2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the asset allowance. As a general rule, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, the spouse is not MA eligible.

As an exception to this general rule, the asset allowance may be increased, through the fair hearing process, if income-producing assets exceeding the asset allowance are necessary to raise the community spouse's income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance is currently defined as the *lesser* of $1,975.50 or $1,727 plus excess shelter costs. *MA Handbook*, Appendix 23.6.0.

III. STATE STATUTES PROVISIONS

Sec. 49.455(6)(b)3, Wis. Stats. states as follows:

> **(6) Permitting transfer of resources to community spouse. (a)** Notwithstanding s. 49.453(2), an institutionalized spouse may transfer an amount of resources equal to the community spouse resource allowance determined under par. (b) to, or for the sole benefit of, the community spouse without becoming ineligible for medical assistance for the period of ineligibility under s. 49.453(3) as a result of the transfer. The institutionalized spouse shall make the transfer as soon as practicable **after the initial determination of eligibility for medical assistance**, . . .
>
> **(b)** The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .
>
> **3.** The amount established in a fair hearing under sub. (8)(d).

Subsection (8)(d) provides as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department

> shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). **Except in exceptional cases which would result in financial duress for the community spouse,** ***the department may not establish an amount to be used under (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)*** . . . (Emphasis added.)

Sub. (4)(b) defines the minimum monthly maintenance needs allowance, which in this particular case is $1,727.00.

Based upon the above, a hearing examiner is allowed to bypass the asset allowance limit by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs income allowance for the community spouse. Therefore, the above provision has been interpreted to allow a hearing examiner to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

However, in this particular case I must conclude I do not have the authority to order assets retained exceeding the asset allowance based upon the assertion the community spouse requires those assets to raise his monthly income to the minimum monthly maintenance needs allowance. The reason is the institutionalized spouse has monthly income of $1,262.71, which, combined with the community spouse's monthly income of $1,702.45 equals $2,965.16. In most

cases, spouses **combined** income does not rise to the minimum monthly maintenance needs allowance.

The *MA Handbook* provisions cited above are directives to the county economic support workers who are responsible for the initial processing of MA applications. Once a county worker has denied an application due to excess assets, the state statutes grant jurisdiction to a fair hearing officer to review the matter and allow an increase in assets in certain circumstances. As I read the underlined portion of sub. (8)(d) referenced above, the institutionalized spouse must make available to the community spouse the amount necessary to raise the community spouse income to the monthly needs allowance **prior to the resource allocation request**. Therefore, a resource allowance via a fair hearing under (6)(b)3 is only an option if the institutionalized spouse transfers all available income (less the relevant allowances) to the community spouse, and the community spouse's income remains below the minimum monthly maintenance needs allowance.

As the state statutes are the controlling legal authority in this particular case, I must follow the directives of sec. 49.455(8)(d) in determining the petitioner must first make her income available to the community spouse. As the couple's total monthly income exceeds $2,400 **even without the asset income listed in Finding of Fact #7**, it appears upon allocation of the institutionalized spouse's income no assets would need be retained to generate income for the community spouse.

CONCLUSIONS OF LAW

1. That I do not have jurisdiction to allow the community spouse to retain assets above the asset allowance because the petitioner has not made any of her income available to the community spouse.

2. That the county correctly denied the MA application as the community spouse has assets in excess of the asset allowance.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be *received no later than 20 days* after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 10th day of June, 1997.

/s/
Kenneth P. Adler, Attorney
DIVISION OF HEARINGS AND APPEALS
5/24/97kpa

cc: Petitioner
Green County
Attorney Scott Thompson

42 U.S.C. § 1396r-5 (1994)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to--

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services from organizations receiving certain waivers

This section applies to individuals receiving institutional or noninstitutional services from any organization receiving a frail elderly demonstration project waiver under section 9412(b) of the Omnibus Budget Reconciliation Act of 1986 or a waiver under section 603(c) of the Social Security Amendments of 1983.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in

paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is

specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one- half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where--

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the

amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community

spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount

adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who--

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

42 U.S.C.A. § 1396r-5 (1999 Supp., showing post 1993 amendments)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to--

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u-4(a)(7) of this title) or under a PACE program under section 1936u-4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides--

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of

the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust--

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust--

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified,

one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)--

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where--

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no

resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include--

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of--

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse

monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon--

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of--

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer

under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who--

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

Wis. Stat. § 49.455 (1995-96)

49.455 Protection of income and resources of couple for maintenance of community spouse. **(1)** DEFINITIONS. In this section:

(a) "Community spouse" means an individual who is married to an institutionalized spouse.

(b) "Consumer price index" means the consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor.

(c) "Family member" means a minor or dependent child, dependent parent or dependent sibling of an institutionalized or community spouse who resides with the community spouse.

(d) "Institutionalized spouse" means either an individual who is in a medical institution or nursing facility and is married to an individual who is not in a medical institution or nursing facility or an individual who receives services under a waiver under 42 USC 1396n(c) or (d) and is married to an individual who is not in a medical institution or nursing facility and does not receive services under a waiver under 42 USC 1396n(c) or (d).

(e) "Resources" does not include items excluded under 42 USC 1382b(a) or (d) or items that would be excluded under 42 USC 1382b(a)(2)(A) but for the limitation on total value established under that provision.

(2) APPLICABILITY. The department shall use the provisions of this section in determining the eligibility for medical assistance under s. 49.46 or 49.47 and the required contribution toward care of an institutionalized spouse.

(3) ATTRIBUTION OF INCOME. (a) Except as provided in par. (b), no income of a spouse is considered to be available to the other spouse during any month in which that other spouse is an institutionalized spouse.

(b) Notwithstanding ch. 766, for the purposes of sub. (4), the following criteria apply in determining the income of an institutionalized spouse or a community spouse:

1. Except as determined under subd. 2. or 3., unless the instrument providing the income specifically provides otherwise:

a. Income paid solely in the name of one spouse is considered to be available only to that spouse.

b. Income paid in the names of both spouses is considered to be available one-half to each spouse.

c. Income paid in the name of either or both spouses and to one or more other persons is considered to be available to each spouse in proportion to the spouse's interest or, if payment is made to both spouses and each spouse's individual interest is not specified, one-half of the joint interest is considered to be available to each spouse.

2. Except as provided in subd. 3., if there is no trust or other instrument establishing ownership, income received by a couple is considered to be available one-half to each spouse.

3. Subdivisions 1. and 2. do not apply to income other than income from a trust if the institutionalized spouse establishes, by a preponderance of the evidence, that the ownership interests in the income are other than as provided in subds. 1. and 2.

(4) PROTECTING INCOME FOR COMMUNITY SPOUSE. (a) After an institutionalized spouse is determined to be eligible for medical assistance, in determining the amount of that institutionalized spouse's income that must be applied monthly to payment for the costs of care in the institution, the department shall deduct the following amounts in the following order from the institutionalized spouse's income:

1. The personal needs allowance under s. 49.45(7)(a).

2. The community spouse monthly income allowance calculated under par. (b) or the amount of income of the institutionalized spouse that is actually made available to, or for the benefit of, the community spouse, whichever is less.

3. A family allowance for each family member equal to one-third of the amount by which the family member's monthly income is exceeded by the following:

a. Beginning on September 30, 1989, and ending on June 30, 1991, 122% of one-twelfth of the poverty line for a family of 2 persons.

b. Beginning on July 1, 1991, and ending on June 30, 1992, 133% of one-twelfth of the poverty line for a family of 2 persons.

c. Beginning on July 1, 1992, 150% of one-twelfth of the poverty line for a family of 2 persons.

4. The amount incurred as expenses for medical or remedial care for the institutionalized spouse.

(b) The community spouse monthly income allowance equals the greater of the following:

1. The minimum monthly maintenance needs allowance determined under par. (c) or the amount determined at a fair hearing under sub. (8)(c), if such an amount has been determined, minus the amount of monthly income otherwise available to the community spouse.

2. The amount of monthly support which a court orders the institutionalized spouse to pay for the support of the community spouse.

(c) 1. For any year, the minimum monthly maintenance needs allowance equals the lesser of the amount determined under subd. 2., or the sum of the following:

a. One-twelfth of 200% of the poverty line for a family of 2 persons.

b. Any excess shelter allowance under par. (d).

2. The minimum monthly maintenance needs allowance in a year may not exceed $1,500 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved.

– 3. In making the calculation under subd. 1.a., when the poverty line is revised the department shall use the revised amount starting on the first day of the 2nd calendar quarter beginning after the date of publication of the revision.

(d) The excess shelter allowance equals the amount by which 30% of the amount determined under par. (c)1.a. is exceeded by the sum of the following:

1. The community spouse's expenses for rent or mortgage principal and interest, taxes and insurance for his or her principal residence and, if the community spouse lives in a condominium or cooperative, any required maintenance charge.

2. The standard utility allowance established under 7 USC 2014(e), except that if the community spouse lives in a condominium or cooperative for which the maintenance charge includes utility expenses, the standard utility allowance under 7 USC 2014(e) is reduced by the amount of the utility expenses included in the maintenance charge.

(5) RULES FOR TREATMENT OF RESOURCES. (a) 1. The department shall determine the total value of the ownership interest of the institutionalized spouse plus the ownership interest of the community spouse in resources as of the beginning of the first continuous period of institutionalization beginning after September 29, 1989. The spousal share of resources equals one-half of that total value.

2. At the beginning of the first continuous period of institutionalization beginning after September 29, 1989, upon the request of an institutionalized spouse or a community spouse and the receipt of necessary documentation, the department shall assess and document the total value of resources under subd. 1. and shall provide a copy of the assessment and documentation to each spouse and retain a copy for departmental use. If the request is not part of an

application for medical assistance, the department may charge a fee not exceeding the reasonable expenses of providing and documenting the assessment. When the department provides a copy of an assessment, it shall provide notice that a spouse has the right to a fair hearing under sub. (8) after an application for medical assistance is filed.

(b) Notwithstanding ch. 766, in determining the resources of an institutionalized spouse at the time of application for medical assistance, the amount of resources considered to be available to the institutionalized spouse equals the value of all of the resources held by either or both spouses minus the greatest of the amounts determined under sub. (6)(b)1. to 4.

(c) The amount of resources determined under par. (b) to be available for the cost of care does not cause an institutionalized spouse to be ineligible for medical assistance, if any of the following applies:

1. The institutionalized spouse has assigned to the state any rights to support from the community spouse.

2. The institutionalized spouse lacks the ability to execute an assignment under subd. 1. due to a physical or mental impairment but the state has the right to bring a support proceeding against the community spouse without an assignment.

3. The department determines that denial of eligibility would work an undue hardship.

(d) During a continuous period of institutionalization, after an institutionalized spouse is determined to be eligible for medical assistance, no resources of the community spouse are considered to be available to the institutionalized spouse.

(6) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE. (a) Notwithstanding s. 49.453(2), an institutionalized spouse may transfer an amount of resources equal to the community spouse resource allowance determined under par. (b) to, or for the sole benefit of, the community spouse without becoming ineligible for medical assistance for the period of ineligibility under s. 49.453(3) as a result of the transfer. The institutionalized spouse shall make the transfer as soon as practicable after the initial determination of eligibility for medical assistance, taking into account the amount of time that is necessary to obtain a court order under par. (c).

(b) The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following:

1. In any year, $12,000 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the calendar year involved.

1m. $50,000.

2. The lesser of the following:

a. The spousal share computed under sub. (5)(a)1.

b. In any year, $60,000 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved.

3. The amount established in a fair hearing under sub. (8)(d).

4. The amount transferred under a court order under par. (c).

(c) If a court has entered a support order against a community spouse, s. 49.453 does not apply to resources transferred under the order for the support of the community spouse or a family member.

(7) NOTICE. The department shall notify both spouses upon a determination of medical assistance eligibility of an institutionalized spouse, or shall notify the spouse making the request upon a request by either an institutionalized spouse or a community spouse, of all of the following:

(a) The amount of the community spouse monthly income allowance calculated under sub. (4)(b).

(b) The amount of any family allowances under sub. (4)(a)3.

(c) The method for computing the amount of the community spouse resource allowance under sub. (6)(b).

(d) The spouse's right to a fair hearing under sub. (8) concerning ownership or availability of income or resources and the determination of the community spouse monthly income or resource allowance.

(8) FAIR HEARING. (a) An institutionalized spouse or a community spouse is entitled to a departmental fair hearing concerning any of the following:

1. The determination of the community spouse monthly income allowance under sub. (4)(b).

2. The determination of the amount of monthly income otherwise available to the community spouse used in the calculation under sub. (4)(b).

3. After an application for medical assistance benefits is filed, the computation of the spousal share of resources under sub. (5)(a)1.

4. The attribution of resources under sub. (5)(b).

5. The determination of the community spouse resource allowance under sub. (6)(b).

(b) If the institutionalized spouse has made an application for medical assistance, and a fair hearing is requested under par. (a) concerning the determination of community spouse resource allowance, the department shall hold the hearing within 30 days after the request.

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

(d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an

amount to be used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b) or, if the institutionalized spouse does not have sufficient income to make available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b), unless the institutionalized spouse makes all of his or her income, except for an amount equal to the sum of the personal needs allowance under sub. (4)(a)1. and any family allowances under sub. (4)(a)3. paid by the institutionalized spouse and the amount incurred as expenses for medical or remedial care for the institutionalized spouse under sub. (4)(a)4., available to the community spouse as a community spouse monthly income allowance under sub. (4)(b).

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration
105 West Adams Street
15th Floor
Chicago, Illinois 60603

December 1993

CHICAGO REGIONAL STATE LETTER NO.: 51-93

Subject: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources--INFORMATION

Some State Medicaid agencies have recently posed questions concerning the authority of State hearing officers to adjust the State resource standards under spousal impoverishment procedures in determining eligibility. The specific issue is whether a hearing officer may allow resources in excess of the State established maximum when a couple contends that such additional resources are necessary in order to bring the community spouse's income up to State levels.

As explained in more detail below and in the enclosed statement, State hearing officers should be allowed to use Section 1924(e)(2)(C) to increase the protected amount of resources (PRA) only after eligibility has been established for the institutionalized spouse, not before eligibility is established or during that process. Enclosed for your information is a discussion of the issue and certain guidelines which hearing officers have to follow using Section 1924(e)(2)(C).

An example is a State's determination of resource eligibility for an institutionalized spouse with $50,000 total assets. The State has set the community spouse's resource allowance at

$25,000. Using the example, the institutionalized spouse would have to reduce his resources to the $2,000 SSI resource standard for an individual before he could be eligible for Medicaid.

Applications which do not meet the above requirements are being properly denied. Appeals have been filed, however, on the basis that the community spouse needs more than $25,000 in *income-producing* resources in order to meet living expenses. If State hearing officers approve these appeals, the State's resource test is rendered moot. Such determinations circumvent normal eligibility standards imposed by the State, and are in conflict with *State Medicaid Manual* instructions which indicate that additional allocations of resources are a *post-eligibility* action rather than one being done in order to establish eligibility. Please refer to the enclosed policy statement for further discussion.

If you have any questions, please contact your Medicaid Program Specialist.

/s/
David DuPre, Chief
Medicaid Operations Branch
Division of Medicaid

Originating Component: Medicaid Operations Branch
Division of Medicaid

Enclosure

SPOUSAL IMPOVERISHMENT AND HEARING OFFICER'S AUTHORITY TO PROTECT ADDITIONAL RESOURCES

Section 1924(e)(2)(C), allows hearing officers to increase the protected resources amount (PRA) rather than the "resource allowance." The PRA is the amount of resources protected for the community spouse in determining the institutionalized spouse's eligibility for Medicaid. Hearing officers may use section 1924(e)(2)(C) in this manner, but only after following certain rules, as explained below.

These rules limit the practice of institutionalized spouses sheltering with their community spouses large amounts of valuable resources which do not (by chance or design) generate much income. For example, a State may have protected for a community spouse $70,000 when it determined the institutionalized spouse's eligibility. The community spouse, in turn, might have invested the $70,000 at a nominal 1% rate of return, then requested a section 1924(e)(2)(C) hearing to raise her resource allowance in order to generate more income. Using this approach, an institutionalized spouse could arrange to protect with the community spouse a very sizeable amount of resources. We do not believe that the Medicaid program should subsidize this practice.

Section 1924(e)(2)(C) allows a couple to revise the resource allowance (which we are reading as the PRA) if the PRA does not generate enough income to bring the community spouse's income up to the minimum monthly maintenance needs allowance (the "monthly maintenance needs standard") in discussing the post-eligibility formula under section 1924(d). Section 1924 includes specific formulas for preserving particular amounts of income for the community spouse. Section 1924(c)(2) and (f)(2)(A) provide a formula for calculating the portion of a couple's combined resources that must be preserved for the community spouse. Similarly,

section 1924(d)(2) contains a complex formula based on the Federal poverty guidelines and each individual spouse's residential expenses to determine exactly how much of the institutionalized spouse's income must be protected in the post-eligibility calculation for the community spouse.

It is our view that Congress meant, in almost all cases, for the community spouse to have his or her resources and income protected in the manner dictated by these precise and detailed formulas. We believe any hearings which are allowed under section 1924(e) for altering either the income allowance or PRA are designed for exceptional circumstances under which the formulas do not achieve the desired results. For income, this would cover situations in which the amount of income normally provided to a community spouse would be inadequate because of unusual circumstances resulting in financial duress. For protected resources, this would be situations in which the avenue for protecting income under section 1924(d) does not provide the amount of income Congress believed to be necessary for the spouse to live in the community (as reflected in the monthly maintenance needs standard).

As a result, we are interpreting section 1924(e)(2)(C) as making available to a couple a hearing for purposes of raising the PRA only when the institutionalized spouse has used the usual means of protecting income under section 1924(d) to the maximum extent possible. We see no reason to afford a couple a hearing to alter the usual formula when that formula will provide the protection that Congress contemplated. As a result, we are requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under section 1924(d)(1)(B) before being allowed to raise the PRA under section 1924(e)(2)(C). The State would have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse.

In order to avoid the result of community spouses sheltering valuable resources which generate little income, we believe the law can be interpreted to require that a hearing officer calculate the income-bearing value of resources the community spouse wishes to acquire at a reasonable rate. Section 1924(e)(2)(C) says that the State must substitute for the resource allowance an amount of resources that is "adequate to provide" the minimum monthly maintenance needs standard which is discussed in the post-eligibility formula under section 1924(d). Since the statute does not provide any requirements for determining an "adequate" amount, we have some flexibility in interpreting what is "adequate."

Since a State must judge what resources are "adequate" to provide the maintenance needs standard, guides to the States in valuing resources are appropriate. If certain resources do not generate any income, they cannot help the community spouse to receive the maintenance needs standard. Therefore, States should not count these resources as part of the "adequate amount" of additional resources necessary to achieve this income level. Moreover, a State should value the income-producing capacity of a resource based upon its saleable or market value, invested at a reasonable rate of return if it were invested in a safe investment such as government-backed securities. In addition, States should require that their hearing officers value any resources which are actually earning at a higher rate of return at their actual rate of return.

The same rules should apply when the hearing officer assesses the income-bearing value of the current PRA in order to determine how much the community spouse should receive in additional resources. We base this conclusion on the language in section 1924(e)(2)(C). The statute allows either spouse to establish that the community spouse resource allowance is inadequate, in relation to the amount of income

generated by such an allowance, and to substitute "an amount adequate to provide for [the spouse's minimum maintenance needs]." We interpret this provision to mean that the adequate amount should be measured based upon a reasonable assessment of the income producing capacity of both spouses' resources. This would base the income producing value of resources on the amount of income a resource allowance of this amount (or value) should generate, rather than the income the community spouse's actual resource allowance generates.

The State must also consider the community spouse's existing income in determining how much more income must be generated by resources in order to provide this spouse with the monthly maintenance needs standard. We base this conclusion on the wording of section 1924(e)(2)(C). This provision says that, if the income generated by the resource allowance is inadequate *to raise the community spouse's income* to the minimum monthly maintenance needs standard, there shall be substituted for the resource allowance an amount adequate to provide such a minimum monthly maintenance needs standard. This provision refers to the community spouse's existing income as a base amount, to which a State may add additional income by way of increasing the community spouse's share of the couple's income-generating resources.

Also, the community spouse's income will include whatever portion of the monthly income allowance the institutionalized spouse will make available to him or her. Since the institutionalized spouse must transfer the income allowance to the community spouse to have it deducted in the post-eligibility calculation, the State should include this income as available to the community spouse when it counts that spouse's own income.

Prepared by Medicaid Bureau 11/16/93

DEPARTMENT OF HEALTH & HUMAN SERVICES — Health Care Financing Administration

Memorandum

MAR 3 1994

FROM : Director
Medicaid Bureau

SUBJECT: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources

TO : All Regional Administrators
ATTN: Associate Regional Administrator, Division of Medicaid

A State has raised some concerns to us about a November 18, 1993 memorandum which we sent to the Dallas Regional Office. This memorandum dealt with the subject of allowing individuals who are covered under the spousal impoverishment provisions to have a hearing to raise the amount of resources protected for the community spouse. We sent copies of this memorandum to all regional administrators. The November 18th memorandum said that hearing officers must follow the guidelines that were attached to the memorandum. Also, the memorandum suggested that a couple's right to a hearing to raise the protected resource amount (PRA) was available only as part of the post eligibility process.

The spousal impoverishment provisions in § 1924 of the Social Security Act are extremely complicated. They are in places ambiguous and incomplete. We believe that this is particularly the case in regard to the provision which allows a couple to have a hearing to raise the PRA. Because this issue is complex, it may have resulted in our failing to clearly explain our position on the subject in some of our policy

issuances. We would like at this time to clarify our current policy.

Although our memorandum suggested that the hearing to raise the PRA is available only as part of the post-eligibility process, we meant that the hearing is available as part of the institutionalized spouse's initial eligibility determination, when the spouses' resources are pooled and a specific amount is protected for the community spouse. We meant "after eligibility" only in the sense that an institutionalized spouse who is found ineligible can resort to a hearing to try to raise the PRA before reapplying.

The memorandum also appears to require that States follow the guidelines that were attached to the memorandum. Among these guidelines was the requirement that the institutionalized spouse first make available to the community spouse the largest possible income allowance (as determined by the State) under the post-eligibility calculation before he or she can raise the PRA. We did not intend to mandate the policies in the guidelines; they are instead "guidance" which we believe is a reasonable interpretation of the spousal impoverishment provisions. That is, States are not required to follow these "guidelines," but may follow other reasonable interpretations of the law.

The State Medicaid Manual (SMM) provision which covers this issue is located in § 3262.3. It says that there can be no substitutions (for the PRA) when institutionalized spouses do not make available monthly income allowances to community spouses (the "income first" rule). We have never intended to mandate this policy. The transmittal page that was issued with the manual provision contained the following note:

> Although this manual is interpretive, it contains certain requirements which are specified by statute and are binding, as well as

"derived" policies which build upon the statutory requirements. These derived policies are identified as such and are in no way binding. You are free to adopt reasonable alternative interpretations with respect to them until we adopt final regulations addressing these policies.

The "income first" rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding. However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived" policy within the text of the SMM. As a result, we believe that States may have been somewhat confused about our position on the "income first" issue. We would now like to clarify that States have the option to use the "income first" rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

Sally K. Richardson

DEPARTMENT OF HEALTH & HUMAN SERVICES

HEALTH CARE FINANCING ADMINISTRATION
105 WEST ADAMS STREET
15TH FLOOR
CHICAGO, ILLINOIS 60603

July 1994

CHICAGO REGIONAL STATE LETTER NO.: 22-94

Subject: Spousal Impoverishment and Hearing Officer's Authority to Protect Additional Resources--INFORMATION

Chicago Regional State Letter (CRSL) #51-93, concerning the above topic, indicated that hearing officers should follow the guidelines that were enclosed with the letter. The letter also indicated that a couple's right to a hearing to raise the protected resource amount (PRA) was available only as part of the post-eligibility process. Questions raised about these issues have caused reexamination of our stated policies.

The spousal impoverishment provisions in §1924 of the Social Security Act are extremely complicated. They are in places ambiguous and incomplete. We believe that this is particularly the case in regard to the provision which allows a couple to have a hearing to raise the PRA. Due to these difficulties, we may have failed to clearly explain our position on the subject in our policy issuances. We would like at this time to clarify our current policy.

Although the CRSL indicated that the hearing to raise the PRA is available only as part of the post-eligibility process, we are correcting that statement. The *hearing* is available as part of the institutionalized spouse's initial eligibility

determination, when the spouses' resources are pooled and a specific amount is protected for the community spouse. The phrase "after eligibility" means that an institutionalized spouse who is found ineligible can resort to a hearing to try to raise the PRA before reapplying.

The CRSL also appears to require that States follow the guidelines enclosed with the letter. Among these guidelines was the requirement that the institutionalized spouse first make available to the community spouse the largest possible income allowance (as determined by the State) under the post-eligibility calculation before he or she can raise the PRA. We did not intend to mandate the policies in the guidelines; they are instead "guidance" which we believe is a reasonable interpretation of the spousal impoverishment provisions. That is, States are not required to follow these guidelines, but may follow other reasonable interpretations of the law.

The State Medicaid Manual (SMM) provision which covers this issue is located in §3262.3. It says that there can be no substitutions (for the PRA) when institutionalized spouses do not make available monthly income allowances to community spouses (the "income first" rule). We have never intended to mandate this policy. The transmittal page that was issued with the manual provision contained the following note:

> Although this manual is interpretive, it contains certain requirements which are specified by statute and are binding, as well as "derived" policies which build upon the statutory requirements. These derived policies are identified as such and are in no way binding. You are free to adopt reasonable alternative interpretations with respect to them until we adopt final regulations addressing these policies.

The "income first" rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding. However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived" policy within the text of the SMM. As a result, we believe that States may have been somewhat confused about our position on the "income first" issue. We would now like to clarify that States have the option to use the "income first" rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

If you have any questions, please contact your Medicaid Program Specialist.

/s/

Alan Freund, Acting Chief
Medicaid Operations Branch
Division of Medicaid

Originating Component: Medicaid Operations Branch
Division of Medicaid

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 28 1996

The Honorable George V. Voinovich
Governor
State of Ohio
Columbus, Ohio 43266-0601

Dear Governor Voinovich:

Thank you for your letter regarding the Medicaid spousal impoverishment provisions and the decision of the Ohio court in *Chambers v. Ohio Department of Human Services*.

Let me assure you that the Department views the State of Ohio's income first policy as a legally permissible interpretation of the Medicaid statute. I am enclosing a March 3, 1994, Health Care Financing Administration memorandum which reflects this Departmental position.

In light of our support for State flexibility, the Department has no plans to mandate the income first rule. The rule will continue to be an option for States.

Sincerely,

/s/
Donna E. Shalala

Enclosure

ORIGINAL

Supreme Court, U.S.
FILED
JAN 17 2001
CLERK

No. 00-952

In The
Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Supreme Court Rule 15, the respondent, by her attorney, Mitchell M. Hagopian, asks leave to file the attached Respondent's Brief and Appendix for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* in the Wisconsin Court of Appeals, District IV.

The affidavit of respondent's guardian in support of this motion is attached hereto.

Mitchell Hagopian
Attorney for Respondent
Counsel of Record

JAN 11 2001

No. 00-952

In The
Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED *IN FORMA PAUPERIS*

STATE OF WISCONSIN)
)
COUNTY OF GREEN)

I, Burnett Blumer on oath being first duly sworn, depose and say that:

I am the husband of and guardian for Irene Blumer, the respondent, in the above-entitled case (copy of letters of Guardianship attached and incorporated by reference); that in support of Respondent's motion to respond to the petitioner's request for a writ of certiorari from this Court without being required to prepay fees, costs or give security therefor or to pay for the costs of having briefs prepared and printed; I state that because of poverty she is unable to pay the costs of said proceeding or to give security therefor; or to pay for the costs of having briefs prepared and printed.

I further swear that the responses which I have made to the questions and instructions below relating to her ability to pay the cost of prosecuting the appeal are true.

1. Is the respondent presently employed?

   No. The respondent is 77 years old and has been residing in a nursing home for the past six years. She was last employed in 1989 by Moore Business Forms in Monroe, Wisconsin. She retired from that job in 1989. I do not know what her last monthly salary was.

2. Has the respondent received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

   Yes. The respondent receives Social Security benefits and a pension from her last employer. Her Social Security benefits for the preceding twelve months totaled approximately $12,294. Her pension benefits for the past twelve months has totaled approximately $4,028.64. Because she is a recipient of Medicaid benefits (and has been since 1997) all but $45 of her monthly income is paid to the nursing home in which she resides or to me, Burnett Blumer, her dependent community spouse.

3. Does the respondent own any cash or checking or savings account?

   No.

4. Does the respondent own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes. In accordance with the Medicaid eligibility rules the respondent set aside $6,195 in 1997 to cover burial costs. This money is located in certificates of deposit (current value

$8,667). The respondent also has a certificate of deposit which can be accessed for personal needs in excess of her $45 monthly personal needs allowance (principally clothing and non-Medicaid covered medical costs). Interest generated from this certificate of deposit is paid to the nursing home. The current value of the certificate of deposit is $2,000. The funds set aside for burial and the certificate of deposit are considered exempt resources by Medicaid.

5. List the persons who are dependent upon the respondent for support and state the respondent's relationship to those persons.

Burnett Blumer. He is the respondent's husband.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Burnett Blumer
Burnett Blumer
Guardian for Irene Blumer, Respondent

Subscribed and sworn to before me
this 9th day of January, 2001.

Sharon L. Pape
Notary Public, State of Wisconsin
My Commission expires 6-09-02.

FEB 02 1999

STATE OF WISCONSIN CIRCUIT COURT GREEN COUNTY

In the Matter of the Guardianship and Protective Placement of:

IRENE G. BLUMER
Incompetent.
DOB: August 29, 1923

LETTERS OF GUARDIANSHIP

File No. 94-GN-44

FILED
CIRCUIT COURT
GREEN COUNTY WIS
DEC 15 1994
DAVID G. DEININGER
JUDGE

THE STATE OF WISCONSIN TO: Burnett A. Blumer

WHEREAS, you have been appointed guardian of the person and estate of Irene G. Blumer, incompetent, and you have fully qualified;

NOW, THEREFORE, these Letters are issued to you, and you are ordered to faithfully discharge your trust in relation thereto according to law, until you are discharged therefrom by order of this court.

IN TESTIMONY WHEREOF I have signed these presents and affixed the seal of this Court this 15th day of December, 1994.

David G. Deininger
Green County Circuit Judge

CIRCUIT COURT
GREEN COUNTY, WIS.

No. 00-952

In The
Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

MITCHELL HAGOPIAN
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Counsel of Record

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Supreme Court, U.S.
FILED
JAN 17 2001
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No. 00-952

In The
Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

I. THE DECISION OF THE WISCONSIN COURT OF APPEALS DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION; HAS NO IMPACT OUTSIDE WISCONSIN AND HAS VERY LIMITED FISCAL OR ADMINISTRATIVE IMPACT IN WISCONSIN.

There is no question that the decision of the Wisconsin court of appeals is not in accord with the holdings of several other jurisdictions. The relevant questions for this Court, however, are whether the decision creates a significant federal question and whether the decision will require any other jurisdiction—state or federal—to change existing practices. The answer to all of those questions is no.

The petitioner asserts that the decision presents a significant federal question because it "will require significant changes in the way Wisconsin and many other states have routinely administered the spousal impoverishment sections of the MCCA." (Petition at 18)[1]. The petition fails, however, to identify any specific administrative practice of Wisconsin or any other state that will be required to be changed. The reason for that is simple. There is none.

First, as to any state other than Wisconsin the decision will not require any changes because it is not binding precedent on any other state. The petitioner's statement that it "will require" anything in any other state is a misrepresentation of the effect of this decision.

Second, even in Wisconsin the decision will have virtually no effect on any practice of the agency. Long before this decision the state's hearing examiners routinely conducted hearings to increase the community spouse resource allowance based on a shortfall in the community spouse's income. In many cases, even when the institutionalized spouse's income was made available, additional assets were needed to generate income to raise the community spouse's income to the minimum monthly maintenance needs allowance. The practical effect of the decision is simply that the hearing examiner will now include one less number in the calculation of what constitutes the "community spouse's income." This change in administrative practice is barely detectable—it certainly is not, as the petitioner contends, "significant."

Third, the decision will have no federal effect. Neither the Seventh Circuit Court of Appeals nor either of Wisconsin's federal district courts has ruled on this issue. Therefore, no conflict with federal courts relevant to Wisconsin exists.

[1]Hereafter references to the petition will appear as "Pet. at__" and references to the petition's appendix will appear as "Pet. app. at__."

II. EVEN USING PETITIONER'S GROSSLY EXAGGERATED ESTIMATES, THE FISCAL IMPACT OF THE DECISION ON WISCONSIN AND FEDERAL MEDICAID EXPENDITURES WILL BE MINIMAL.

The petitioner also asserts that the court of appeals decision will have a substantial fiscal impact on Wisconsin's Medicaid budget. (Pet. at 18-20). Specifically, it asserts that every 100 new "resource first" cases will cost $10 million in additional Medicaid expenditures. It bases this assertion on a projected cost of $2000 per month for each case with an estimated length of Medicaid eligibility of fifty months per case ($2000 x 100 x 50 = $10,000,000). There are many problems with this estimate. First, petitioner fails to support any of these projections with cites to any data. Apparently this Court is expected to take petitioner's self-serving "estimates" at face value. In fact, data from the petitioner itself undercuts these numbers. According to the petitioner's Division of Health Care Financing in 1999 (the latest year for which data is available) only 26% of nursing home residents at a Medicaid reimbursable level of care had been there for four or more years.[2] Thus the petitioner's "estimated average" of fifty months of Medicaid eligibility for "resource first" cases is not at all based on the reality of the actual length of most nursing home stays. The petitioner's choice of 50 months would instead appear to be for the purpose of inflating the cost of the court of appeals decision to the nice round figure of $10 million.

Second, even if, *arguendo*, the exaggerated figure of $10 million is accepted, the fiscal impact on Medicaid is minimal. Initially, that figure represents the estimated cost over more than four years. On an annual basis the cost would be $2.4 million. To put that number in

[2]*Wisconsin Nursing Homes and Facilities for the Developmentally Disabled 1999*, Wisconsin Department of Health and Family services, November 2000, Table 22, p. 38 (relevant excerpts attached as Appendix 1a-2a).

perspective, the total Medicaid expenditures by Wisconsin in the current fiscal year (July 1, 2000-June 30, 2001) will be over $2.9 billion.[3] The $2.4 million the petitioner is concerned about represents .00082—less than one thousandth—of the Wisconsin Medicaid budget. This impact can only be described as microscopic.

Third, the decision will have no unforeseen effect on federal Medicaid expenditures. The resource-first methodology—unlike the income-first methodology—is clearly allowed by the Medicaid law. Therefore it is entirely possible that all fifty states could adopt it. That possibility is already a budgetary fact of life in the federal Department of Health and Social Services' fiscal calculations. Any expenditures that might be related to the resource-first methodology would be included in the agency's appropriation request, just as expenditures are for any other additions to a state Medicaid program that are sanctioned by the federal Medicaid law.

III. PETITIONER'S CLAIM THAT THE DECISION WILL RESULT IN NUMEROUS HUGE CSRA'S IS WRONG

Petitioner also claims that this decision will regularly lead to community spouse resource allowances (CSRA) of "$340,000 or more." (Pet. at 20, FN 14). Petitioner arrives at this figure by assuming that each community spouse will require an average of $992 per month in additional income to raise her income to the minimum monthly maintenance needs allowance (MMMNA) (pet. at 19-20).[4] Petitioner then claims that it will take an average of $340,000 in

[3]See generally, Wis. Stats. § 20.005 (1999-2000) specifically, the section from Figure 20.005(3) which contains the line item appropriations for the Health Care Financing division of the Health and Family Services Department; 20.435(4)(b), (bm), (im), (o) and (pm). Total Medicaid appropriation =$2,929,530,500. (Relevant excerpts attached as app. 3a-6a).

[4]Once again, petitioner cites no data to support this estimate.

assets to generate $992 on a monthly basis. This figure is arrived at by assuming a return on principal of 3.5%. (Pet. at 20, FN 14). Obviously, petitioner is using an unrealistically low interest rate for the purpose of inflating the amount of assets necessary to generate the needed income. Using the realistic, yet still conservative interest rate of 6%--a rate which financial institutions are actually paying on certificates of deposit in Madison, Wisconsin[5]--the amount suddenly drops by over $140,000 to $198,800.

Apart from petitioner's flawed mathematical assumptions, there are at least two practical impediments which will ensure that large increases, whether they be to $340,000 or $198,800, will not occur in a significant number of cases.

First, acquiring an expanded CSRA is by no means a simple process. Only a hearing examiner can expand the CSRA. In order to get before an examiner a person must first apply for Medicaid with the certain knowledge that the application will be denied by the county.[6] That person must then request a hearing within the 45 day time period for appealing negative decisions. Finally, the person must make a significant offer of proof, including detailed and sensitive information about the person's financial situation, in order to convince the examiner of the appropriateness of the requested increase. Of course, all this assumes that a couple has somehow become aware of this entire process before they have spent down all their assets on nursing home care. Given that county agencies are under no obligation to inform the public or even applicants about this process, (and in this office's experience regularly deny its existence)

[5]See attached rate sheet from State Capitol Credit Union for the period January 10, 2001 thru January 23, 2001 at Appendix 7a).

[6]Denial is certain because anyone who needs a higher CSRA is, by definition, already over the basic asset eligibility threshold for Medicaid.

public awareness of the process is almost nonexistent. These bureaucratic barriers will certainly cause significant numbers of people who might be eligible for an expanded CSRA not to seek it.

Second, and more important, an expanded CSRA is always limited by the amount of resources the couple actually has. To use the petitioner's figures, while a community spouse that is $992 short of the MMMNA may theoretically be entitled to have her CSRA expanded to $340,000, in reality the CSRA can only be expanded by the amount of resources actually owned by the couple at the time application is made. Thus, if this hypothetical couple had only $10,000 in excess resources the CSRA could only be expanded by $10,000—not to $340,000.

The Blumers' situation illustrates both of these points. As a result of the court of appeals decision, the Blumers will be entitled to have their CSRA expanded by $14,513—the amount by which their assets exceeded Irene Blumer's (the institutionalized spouse's) asset limit of $2,000 and the formula CSRA of $72,822 at the time Irene applied for Medicaid. Yet that expanded CSRA is still insufficient to bring Burnett's (the community spouse's) income up to the MMMNA. As the petitioner correctly noted, Mr. Blumer's income would still be $25 short of the MMMNA. (Pet. at 12-13). Using petitioner's interest rate of 3.5% it would take an additional $8,571 to cover the remaining shortfall. It could not be expanded by that additional amount, however, because at the time of application the Blumers did not have the additional $8,571 needed to cover it. Of course at one time they did have the additional $8,571. When Irene Blumer entered the nursing home the couple had over $145,000 in assets. (Pet. at 12). By the time they became aware of the possibility of expanding the CSRA they had already spent $8,571 more than they would have had to.

In summary, the petitioner's assertions that the court of appeals decision will have a significant fiscal effect on the Medicaid program and result in huge CSRAs are highly exaggerated.

IV. THE WISCONSIN COURT OF APPEALS CORRECTLY CONCLUDED THAT 42 USC §1396r-5(e)(2)(C) WAS NOT AMBIGUOUS.

A. The Statutory Language In (e)(2)(C) Is Plain

Despite the petitioner's claim to the contrary, the court of appeals properly followed established case law in determining that 42 USC §1396r-5(e)(2)(C) was unambiguous. As the court noted, statutory interpretation begins with the plain meaning of the language at issue. It is unnecessary to look past the statutory language if it is clear and unambiguous. (Pet. app. at 10a, ¶17). Contrary to the petitioner's claim, the court of appeals did not turn the ordinary process of statutory interpretation "on its head." (Pet. at 22). It examined the relevant provision in the context of the spousal impoverishment provisions and explained at length why and how its interpretation of (e)(2)(C) fit in comfortably with the rest of 1396r-5. (Pet. app. at 11a-14a, ¶¶20-23).

The court of appeals' analysis is entirely consistent with the method utilized by this Court in King v. St. Vincent's Hospital, 502 U.S. 215 (1991).[7] King involved the interpretation of a statute that guaranteed reemployment rights to members of the armed services that temporarily left their jobs to serve tours of duty. The statute did not condition the reemployment right on length of duty tour. The 11th Circuit Court of Appeals, however, did. It found that any request for a leave of absence made pursuant to the statute had to be "reasonable;" and that the three-year request made in

[7]The petitioner relies on King as support for its assertion that the court of appeals failed to look at (e)(2)(C) in its statutory context. (Pet. at 22).

the case was per se unreasonable. This Court reversed, finding that the statute's silence was an unambiguous expression of congressional intent not to limit the right of reemployment. As the Court put it, there was no "equivocation in the statute's silence, so as to render it susceptible to interpretive choice." Id at 220. Having found no ambiguity in the statutory language, the Court then examined the provision in the context of surrounding provisions of the statute and found that its interpretation was consistent with them. This is precisely the method followed by the Wisconsin court of appeals.

Petitioner, relying on the decisions of other jurisdictions, contends that the phrase "community spouse's income" in (e)(2)(C) becomes ambiguous when read in conjunction with other provisions of 1396r-5. (Pet. at 22). For example, in Cleary v. Waldman, 959 F.Supp. 222 (D.N.J. 1997), the earliest of the "income-first" cases, the court found that the plain language of 42 U.S.C. §1396r-5(e)(2)(C) could not be understood absent an analysis of all the spousal impoverishment provisions contained in the Medicare Catastrophic Coverage Act (MCCA).[8] After engaging in a detailed recitation of these provisions the court concluded:

> In light of the detailed provisions of subsection (d) designed to make available to the community spouse as much, but only as much, of the institutionalized spouse's income as necessary to insure her monthly need, it would be anomalous to construe subsection (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation and substitute for it resources which would provide the needed income to insure the community spouse received her monthly needs allowance. Cleary at 232.

[8]The 3rd Circuit Court of Appeals has upheld the district court's analysis of this issue. See Cleary v. Waldman, 167 F.3rd 801, 807 (3rd Cir. 1999).

The problem with this analysis is that the "detailed provisions of subsection (d)" expressly relate to the allocation of the institutionalized spouse's income for purposes of determining how much of the institutionalized spouse's income will be used to offset the Medicaid payment to the institution after the institutionalized spouse becomes Medicaid eligible. By contrast subparagraph (e)(2)(C) deals exclusively with asset eligibility determinations.

What the court's analysis in Cleary failed to address is that these provisions deal with separate, equally important, but essentially unrelated issues. Subparagraph (e)(2)(C) deals with asset eligibility. Subsection (d) deals with how the institutionalized spouse's income will be spent after she actually becomes Medicaid eligible. Subsection (d) is irrelevant so long as an institutionalized spouse remains ineligible for Medicaid due to excess assets. To put it simply, the institutionalized spouse cannot begin to use her income to help the community spouse augment his income because she is using her income to pay privately for the services Medicaid is not covering due to asset ineligibility. The court's conclusion fails to explain how its analysis of the MCCA in its entirety necessarily leads to a result that differs from a plain English reading of (e)(2)(C). Nor have any of the other decisions adopting the "income first" approach.

B. The Federal Agency's Views On 42 USC §1396r-5(e)(2)(C) Are Entitled To No Deference Because They Have Been Inconsistent And Are Not Contained In Any Of The Normal Sources Of Agency Interpretation.

Petitioner also contends that review is warranted because the court of appeals decision failed to give deference to policy statements by the Department of Health and Human Services (DHSS) and its Health Care Financing Administration (HCFA). (Pet. at 23). Petitioner cites to three HCFA letters and one letter from DHSS Secretary Shalala to Ohio Governor George Voinovich as support for that contention. (See Pet. app. at 78a-90a). The court of appeals did not address the relevance of

these letters in detail in its decision because it found the statute unambiguous, but did note that they were inconsistent with one another. (Pet. app. at 16a, ¶27).

Indeed, these letters are inconsistent. The first letter, dated December 1993, states that the income-first rule is the only method of applying 42 U.S.C. §1396r-5(e)(2)(C). (Pet. app. at 83a). Three months later, in March of 1994[9], HCFA repudiated its December letter and found that the income-first method was permissible and that its instructions should only be considered guidelines; final regulations would be necessary to clarify the issue. (Pet. app. at 84a-89a). Finally, Secretary Shalala's most recent pronouncement on the subject indicates that her department may now be leaning away from the income-first rule: "...the Department has no plans to mandate the income first rule." (Pet. app. at 90a).

The only usable information that can be gleaned from these letters is that we must wait until regulations are issued before the opinion of the Department of Health and Human Services warrants the consideration of any deference. It is true that the DHSS has been granted "exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act." Schweiker v. Gray Panthers, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640, 69 L. Ed. 2d 460 (1981). That authority, however, is not unlimited. First, an agency's interpretation expressed in informal opinions is entitled to less deference than an interpretation promulgated

[9]The July 1994 letter is essentially a verbatim copy of the March 1994 letter. The March letter was issued by the Washington office of HCFA. The July letter is the HCFA Chicago Regional office version of the same letter.

through formal rulemaking. See Christiansen v. Harris County, ____ U.S. ___, 120 S. Ct. 1655, 1662-63 (2000). Second, whatever deference is accorded is further reduced when the agency's interpretations are inconsistent. See I.N.S. v. Cardoza Fonseca, 480 U.S. 421, 446-fn 30 (1987). When, as here, DHSS' policy interpretations are expressed only in conflicting, informal letters despite a 12 year opportunity to engage in notice and comment rulemaking, they warrant no deference.

C. The MCCA Conference Committee Ultimately Adopted The Resource-First Methodology, Albeit In A Different Form Than Contained In The Senate Bill.

The petitioner asserts that specific incorporation of the "resource-first" methodology was rejected in the final version of the Medicare Catastrophic Coverage Act (MCCA). Petitioner is wrong.

Not surprisingly, the final version of the MCCA was the product of a conference committee composed of members of both houses of Congress. The petitioner, as well as courts which have adopted the income-first rule, have focused upon the conference committee's decision not to adopt a Senate provision which would have defined as "excluded resources" resources that were necessary to produce income that is available to the community spouse up to the MMMNA. See H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess., 145, 263, reprinted in 1988 U.S. Code Congressional and Administrative News 923, 1041. (Pet. at 21). While it is true that the Senate provision would have accomplished a result that would have been similar to the resource-first determination, a close examination of how the final statutory language in (e)(2)(C) differed from the Senate version indicates that the conference did not reject the resource-first rule.

In the Senate version of the bill, in addition to the above language on excluded resources, there was a provision for additional increases in the CSRA if the community spouse could prove

financial duress. Ibid at 1041-1042. The bill ultimately adopted by the conference committee did three things. First, it removed the Senate provision which would have identified resources necessary to raise the community spouse's income to the MMMNA as resources excluded in the eligibility determination process. Second, it continued to mandate an expansion of the community spouse resource allowance in the event that the formula CSRA was insufficient to generate income up to the MMMNA. It did this by moving the authority to expand the CSRA to the section involving "notice and fair hearing." Third, it eliminated the possibility of increasing the CSRA to an amount higher than that necessary to achieve the MMMNA. Ibid at 1044-1045.

The principal difference between the Senate version and the conference version has to do with who would make the eligibility determination when eligibility would have to be based on a non-formula CSRA. In the original Senate version that determination would have been made by a county worker. This is because the additional resources necessary to generate the MMMNA were identified as "excluded" resources. County workers make decisions about which resources fall into the category of excluded resources.[10] Thus, under the original Senate version, a county worker would have had to engage in the mathematical calculations necessary to determine if the formula

[10]In Wisconsin, county workers are charged with making initial decisions relating to resource exclusions. They are provided with detailed instructions on which particular resources are excluded. See petitioner's *Medical Assistance Handbook*, appendix 11, attached as appendix 8a-30a. As a general rule, particular resources are excluded from MA eligibility determinations for fairly obvious policy reasons. Moreover, excluded resources are either excluded in their entirety or up to a specific dollar value. By contrast, the "exclusion" contemplated by the original Senate provision would have been totally different from any of the traditional resource exclusions. Whether a particular resource would have been excluded would have been determined by its income producing potential and the need of the individual community spouse. The exclusion could not have been applied uniformly in all cases. Had the original Senate provision been adopted county workers would have been responsible for a complicated, difficult task that was unlike any of their other ministerial duties. In short, it would have created an administrative headache at best and a nightmare at worst.

CSRA was insufficient to generate income up to the MMMNA. By removing the potentially expanded community spouse resource allowance from the group of resources which would be "excluded" under an initial determination of Medicaid eligibility the committee relieved county workers of this onerous task. By requiring that the determination be done through the fair hearing process the conference committee mandated that independent, third party review of the eligibility determination (in the form of a hearing officer or ALJ) in that single circumstance would occur in all cases. The conference version assures that county workers will not be engaging in complicated mathematical calculations which would be subject to numerous and potentially significant errors. It also assures that a person who believes he or she is entitled to a higher CSRA than that generated by the formula CSRA will have to affirmatively request such a determination and will be required to demonstrate the need for it in a formal adjudicative forum.

The other difference between the Senate version and the conference version was to limit the CSRA expansion to an amount necessary to meet the MMMNA.

These changes were significant concessions on the part of the Senate. Nothing in the legislative history indicates that the Senate was also agreeing to a provision which effectively gutted its desire to have resources be the primary funding source of the MMMNA. The courts which have adopted that position have read far more into the legislative history of the MCCA than is supported by the actual record of that enactment.

D. The Fact That "Income First" Is Not Specifically Prohibited By The Statute Does Not Mean That It Is Permitted

Finally, after discussing 42 USC §1396r-5(e)(2)(C) the petitioner states: "Nowhere does subsection (e)(2)(C) preclude or forbid the 'income first' approach of attributing the institutional spouse's income to the community spouse in order to raise the latter's monthly income." (Pet. at

21). This statement is one of the keystones of the whole "income-first" legal structure. Most courts which have adopted the income–first rule have seized on the fact that it is "not prohibited" as authority for their decisions that it is a permissible interpretation. See, e.g. Chambers v. Ohio Dept. of Human Services, 145 F. 3d 793, 802 (6th Cir. 1988), and Thomas v. Com'r, Div. of Med. Assistance, 682 N.E.2d 874, 879 (1997). In fact, there is a logical explanation for the absence of the prohibition. The congress, in enacting the straightforward language of 42 USC §1396r-5(e)(2)(C) presumably did not believe it was necessary to prohibit the imputation of the applicant spouse's income because there was no precedent for the deeming of income from the institutionalized spouse to the community spouse in the Medicaid statute.

One of the main accomplishments of the spousal impoverishment revisions was to end the deeming of community spouse income in the limited context of an application for institutional Medicaid by a married person. (See 42 USC §1396r-5(b)(1).) The specific prohibition on community spouse income deeming was necessary because of the general Medicaid rule, found at 42 USC §1396a(17)(D) that income of a nonapplicant spouse may be considered available to the applicant spouse in an eligibility determination. Because there is no conflicting Medicaid rule with respect to deeming of income away from the applicant spouse it was unnecessary to specifically prohibit it.

It is highly unlikely that the congress considered the possibility that state agencies would invent a theory that permitted them to deem income away from an institutionalized applicant (thereby making that applicant poorer) for the purpose of denying that applicant welfare benefits. With all due respect to the congress, there are only a limited number of schemes by which states

would subvert congressional intent that the congress can be expected to foresee and specifically foreclose.

CONCLUSION

The petition for a writ of certiorari should be denied. The decision of the Wisconsin court of appeals will have no effect outside Wisconsin and will have little practical effect, either administratively or fiscally in Wisconsin. Furthermore, the court did not err in its application of longstanding rules of statutory interpretation and correctly concluded that §42 USC 1396r-5(e)(2)(C) was not ambiguous. The petition has stated no reasons which would warrant granting of the writ.

Dated this 17th day of January 2001.

Mitchell Hagopian
Attorney for Respondent
Counsel of Record

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APPENDIX

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Wisconsin
Nursing Homes
and
Facilities for the Developmentally Disabled

1999

November 2000

Bureau of Health Information
Division of Health Care Financing
Department of Health and Family Services

Table 22. Length of Stay of Nursing Home Residents by Licensure Category, Wisconsin, December 31, 1999

	Licensure Category					
	SNFs/ICFs		IMDs		Total	
Length of Stay	Number	Percent	Number	Percent	Number	Percent
Less than 100 days	6,010	15%	29	10%	6,039	15%
100 days to 180 days	2,783	7	23	8	2,806	7
181 days to 364 days	5,031	13	29	10	5,060	13
1-2 years	6,875	17	77	27	6,952	18
2-3 years	4,980	13	21	7	5,001	13
3-4 years	3,611	9	43	15	3,654	9
4 or more years	10,143	26	64	22	10,207	26
Total	39,433	100%	286	100%	39,719	100%

Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

Notes: Percentages may not add to 100 percent due to rounding. SNFs are skilled nursing facilities; ICFs are intermediate care facilities; IMDs are institutions for mental diseases.

- As of December 31, 1999, 35 percent of SNF and ICF residents had been in the nursing home less than one year (compared with 33 percent in 1998). Fifteen percent had been there less than 100 days, 7 percent had been there between 100 and 180 days, and 13 percent had been there 181 to 364 days.

- About one-fourth of SNF/ICF residents (26 percent) had been in the nursing home four or more years (compared with 27 percent in 1998).

STATUTE, AGENCY AND PURPOSE		SOURCE	TYPE	1999–00	2000–01
(q)	Children's trust fund grants	SEG	C	–0–	–0–
(r)	Children's trust fund: general program operations and statewide projects	SEG	A	30.000	30.000
	20.433 DEPARTMENT TOTALS				
	GENERAL PURPOSE REVENUES			–0–	–0–
	PROGRAM REVENUE			2,574.900	2,588.000
	FEDERAL			(458.500)	(458.500)
	OTHER			(1,776.400)	(1,789.500)
	SERVICE			(340.000)	(340.000)
	SEGREGATED FUNDS			30.000	30.000
	OTHER			(30.000)	(30.000)
	TOTAL–ALL SOURCES			2,604.900	2,618.000
20.434	**Adolescent pregnancy prevention and pregnancy services**				
(1)	ADOLESCENT PREGNANCY PREVENTION AND PREGNANCY SERVICES				
(a)	General program operations	GPR	A	22.400	22.400
(b)	Grants to organizations	GPR	A	87.900	87.900
(kp)	Interagency and intra–agency programs	PR–S	A	89.800	89.800
(ky)	Interagency and intra–agency aids: pregnancy prevention and services	PR–S	C	351.400	351.400
	20.434 DEPARTMENT TOTALS				
	GENERAL PURPOSE REVENUES			110.300	110.300
	PROGRAM REVENUE			441.200	441.200
	SERVICE			(441.200)	(441.200)
	TOTAL–ALL SOURCES			551.500	551.500
20.435	**Health and family services, department of**				
(1)	PUBLIC HEALTH SERVICES PLANNING, REGULATION AND DELIVERY; STATE OPERATIONS				
(a)	General program operations	GPR	A	5,341.000	5,358.000
(gm)	Licensing, review and certifying activities fees: supplies and services	PR	A	4,955.000	5,097.000
(gr)	Supplemental food program for women, infants and children administration	PR	C	–0–	–0–
(i)	Gifts and grants	PR	C	174.500	204.900
(jb)	Congenital disorders; operations	PR	A	16.200	16.200
(kx)	Interagency and intra–agency programs	PR–S	C	696.600	740.400
	Public health	PR–S	C	671.600	715.400
(m)	Federal project operations	PR–F	C	11,765.300	12,689.700
(mc)	Block grant operations	PR–F	C	6,077.100	6,079.000
(n)	Federal program operations	PR–F	C	2,962.500	2,973.200
(q)	Groundwater and air quality standards	SEG	A	331.000	331.000
	(1) PROGRAM TOTALS				
	GENERAL PURPOSE REVENUES			5,341.000	5,358.000
	PROGRAM REVENUE			26,622.200	27,775.400
	FEDERAL			(20,804.900)	(21,741.900)
	OTHER			(5,145.700)	(5,318.100)
	SERVICE			(671.600)	(715.400)
	SEGREGATED FUNDS			331.000	331.000
	OTHER			(331.000)	(331.000)
	TOTAL–ALL SOURCES			32,294.200	33,464.400
(2)	CARE AND TREATMENT FACILITIES				
(a)	General program operations	GPR	A	39,482.600	39,743.400
(aa)	Institutional repair and maintenance	GPR	A	415.700	442.400
(b)	Wisconsin resource center	GPR	A	20,118.700	27,535.400
(bj)	Conditional and supervised release treatment and services	GPR	B	3,568.500	4,060.300
(bm)	Secure mental health units or facilities	GPR	A	8,866.600	8,141.200
(ee)	Principal repayment and interest	GPR	S	10,200.200	10,438.600
(ef)	Lease rental payments	GPR	S	–0–	–0–
(f)	Energy costs	GPR	A	2,241.900	2,283.600

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Statute	Agency and Purpose	Source	Type	1999–00	2000–01
(gk)	Institutional operations and charges	PR	A	150,426,300	152,571,600
(gs)	Sex offender honesty testing	PR	C	–0–	–0–
(i)	Gifts and grants	PR	C	173,400	173,400
(kx)	Interagency and intra–agency programs	PR–S	C	6,788,200	6,897,300
(ky)	Interagency and intra–agency aids	PR–S	C	–0–	–0–
(kz)	Interagency and intra–agency local assistance	PR–S	C	–0–	–0–
(m)	Federal project operations	PR–F	C	–0–	–0–
	(2) PROGRAM TOTALS				
	GENERAL PURPOSE REVENUES			84,894,200	92,644,900
	PROGRAM REVENUE			157,387,900	159,642,300
	FEDERAL			(–0–)	(–0–)
	OTHER			(150,599,700)	(152,745,000)
	SERVICE			(6,788,200)	(6,897,300)
	TOTAL–ALL SOURCES			242,282,100	252,287,200
(3)	Children and family services				
(a)	General program operations	GPR	A	3,169,100	3,501,300
(bc)	Grants for children's community programs	GPR	A	847,200	847,200
(bm)	Services for children and families	GPR	S	–0–	250,000
(c)	Statutory rape prosecution pilot program	GPR	C	183,700	–0–
(cd)	Domestic abuse grants	GPR	A	5,070,200	5,070,200
(cf)	Foster, trtmt foster & family–operated group home parent ins & liability	GPR	A	60,000	60,000
(cw)	Milwaukee child welfare services: general program operations	GPR	A	10,870,200	11,177,700
(cx)	Milwaukee child welfare services: aids	GPR	A	23,478,400	12,161,500
(dd)	State foster care and adoption services	GPR	A	19,692,600	22,922,100
(de)	Child abuse and neglect prevention grants	GPR	A	995,700	995,700
(df)	Child abuse and neglect prevention technical assistance	GPR	A	160,000	160,000
(dg)	State adoption information exchange and state adoption center	GPR	A	125,000	125,000
(dn)	Food distribution grants	GPR	A	170,000	170,000
(eg)	Adolescent services	GPR	A	115,000	592,400
(fm)	Community alcohol and other drug abuse prevention program	GPR	A	250,000	–0–
(gx)	Milwaukee child welfare services: collections	PR	C	2,992,300	2,992,300
(hh)	Domestic abuse assessment grants	PR	C	300,000	300,000
(i)	Gifts and grants	PR	C	–0–	–0–
(jb)	Fees for administrative services	PR	C	20,000	20,000
(jj)	Searches for birth parents and adoption record information: foreign adopt	PR	A	60,800	60,800
(jm)	Licensing activities	PR	A	758,000	758,300
(kc)	Interagency and intra–agency aids: kinship care and long–term kinship care	PR–S	A	22,465,400	24,521,700
(kd)	Kinship care and long–term kinship care assessments	PR–S	A	1,464,000	1,464,000
(km)	Federal block grant transfer: aids	PR–S	A	2,492,100	2,517,100
(kw)	Interagency and intra–agency aids: Milwaukee child welfare services	PR–S	C	58,893,500	58,893,500
(kx)	Interagency and intra–agency programs	PR–S	C	4,413,500	4,519,100
(ky)	Interagency and intra–agency aids	PR–S	C	815,000	815,000
(kz)	Interagency and intra–agency local assistance	PR–S	C	1,090,000	1,090,000
(m)	Federal project operations	PR–F	C	270,200	270,300
(ma)	Federal project aids	PR–F	C	1,593,300	1,468,300
(mb)	Federal project local assistance	PR–F	C	–0–	–0–
(mc)	Federal block grant operations	PR–F	C	2,313,000	2,051,200
(md)	Federal block grant aids	PR–F	C	6,314,700	5,114,700
(me)	Federal block grant local assistance	PR–F	C	250,000	–0–

Statute	Agency and Purpose	Source	Type	1999–00	2000–01
(mw)	Federal aid: Milwaukee child welfare services general program operations	PR–F	C	4,017,400	4,891,000
(mx)	Federal aid: Milwaukee child welfare services aids	PR–F	C	6,187,300	6,934,800
(n)	Federal program operations	PR–F	C	4,158,500	5,104,200
(na)	Federal program aids	PR–F	C	2,915,000	2,915,000
(nL)	Federal program local assistance	PR–F	C	4,560,600	5,889,200
(o)	Community aids; prevention activities	PR–F	C	2,710,100	2,710,100
(pd)	Federal aid: state foster care and adoption services	PR–F	C	18,314,300	21,283,100
(pm)	Federal aid: adoption incentive payments	PR–F	C	317,400	1,022,100
	(3) PROGRAM TOTALS				
	GENERAL PURPOSE REVENUES			65,187,100	58,033,100
	PROGRAM REVENUE			150,286,400	157,605,800
	FEDERAL			(54,521,800)	(59,654,000)
	OTHER			(4,131,100)	(4,131,400)
	SERVICE			(91,633,500)	(93,820,400)
	TOTAL–ALL SOURCES			215,473,500	215,638,900
(4)	Health services planning, regulation and delivery; health care financing				
(a)	General program operations	GPR	A	7,313,200	7,378,800
(af)	HIRSP: transfer to fund for costs	GPR	A	9,900,000	11,900,000
(ah)	HIRSP: transfer to fund for premium and deductible reduction subsidy	GPR	B	780,800	780,800
(b)	Medical assistance program benefits	GPR	B	972,242,300	995,912,200
(bc)	Health care for low–income families	GPR	C	22,356,500	34,218,300
(bm)	Medical assistance administration	GPR	B	19,193,200	18,813,800
(bt)	Relief block grants to counties	GPR	A	2,000,000	2,000,000
(d)	Facility appeals mechanism	GPR	A	546,800	546,800
(e)	Disease aids	GPR	B	4,060,200	4,932,000
(g)	Family care benefit: cost sharing	PR	C	–0–	8,476,700
(gm)	Health services regulation and vital statistics	PR	A	1,610,100	1,610,700
(gp)	Health care and graduate medical education: aids	PR	C	1,550,000	1,500,000
(h)	General assistance medical program: intergovernmental transfer	PR	A	2,500,000	2,500,000
(hg)	General program operations: health care information	PR	A	2,092,000	2,437,500
(hi)	Compilations and special reports	PR	C	–0–	–0–
(i)	Gifts and grants; health care financing	PR	C	–0–	–0–
(im)	Medical assistance; recovery of correct payments	PR	C	14,502,700	14,502,700
(in)	Community options program; costs of care recovery administration	PR	A	72,500	72,600
(jz)	Badger care premiums	PR	C	1,199,300	1,660,200
(kb)	Relief block grants to tribal governing bodies	PR–S	A	800,000	800,000
(kx)	Interagency and intra–agency programs	PR–S	C	1,074,000	1,374,000
(ky)	Interagency and intra–agency aids	PR–S	C	1,008,700	1,070,000
(kz)	Interagency and intra–agency local assistance	PR–S	C	–0–	–0–
(m)	Federal project operations	PR–F	C	347,500	338,500
(ma)	Federal project aids	PR–F	C	–0–	–0–
(md)	Federal block grant aids	PR–F	C	–0–	–0–
(n)	Federal program operations	PR–F	C	22,370,400	22,506,800
(na)	Federal program aids	PR–F	C	7,088,700	7,088,700
(o)	Federal aid: medical assistance	PR–F	C	1,764,341,100	1,863,412,700
(p)	Federal aid: health care for low–income families	PR–F	C	40,033,600	61,758,100
(pa)	Federal aid: medical assistance contracts administration	PR–F	C	35,269,200	36,889,100

Statute, Agency and Purpose		Source	Type	1999–00	2000–01
(u)	HIRSP; administration	SEG	B	3,805,000	3,805,000
(v)	HIRSP; program benefits	SEG	C	46,668,500	46,668,500
	(4) PROGRAM TOTALS				
	GENERAL PURPOSE REVENUES			1,038,393,100	1,076,482,700
	PROGRAM REVENUE			1,895,859,800	2,027,998,300
	FEDERAL			(1,869,450,500)	(1,991,993,900)
	OTHER			(23,526,600)	(32,760,400)
	SERVICE			(2,882,700)	(3,244,000)
	SEGREGATED FUNDS			50,473,500	50,473,500
	OTHER			(50,473,500)	(50,473,500)
	TOTAL–ALL SOURCES			2,984,726,400	3,154,954,500
(5)	PUBLIC HEALTH SERVICES PLANNING, REGULATION & DELIVERY; AIDS & LOCAL ASSIST				
(am)	Services, reimburse & payment related to acquired immunodeficiency syndrome	GPR	A	3,715,900	4,083,800
(cb)	Women's health services	GPR	A	1,225,000	1,027,600
(cc)	Cancer treatment, training, follow–up, control and prevention	GPR	A	1,282,800	1,282,800
(ce)	Services for homeless individuals	GPR	C	125,000	125,000
(ch)	Emergency medical services; aids	GPR	A	2,200,000	2,200,000
(cm)	Immunization	GPR	S	–0–	–0–
(de)	Dental services	GPR	A	2,860,500	2,970,500
(dg)	Tobacco prevention and education program	GPR	A	1,000,000	1,000,000
(ds)	Statewide poison control program	GPR	A	375,000	375,000
(e)	Public health dispensaries and drugs	GPR	B	391,900	391,900
(ed)	Radon aids	GPR	A	30,000	30,000
(ef)	Lead poisoning or lead exposure services	GPR	A	1,004,100	1,004,100
(eg)	Pregnancy counseling	GPR	A	275,000	275,000
(em)	Supplemental food program for women, infants and children benefits	GPR	C	167,300	167,300
(ev)	Pregnancy outreach and infant health	GPR	A	350,000	350,000
(f)	Family planning	GPR	A	1,955,200	1,955,200
(fh)	Community health services	GPR	A	3,975,000	4,175,000
(i)	Gifts and grants; aids	PR	C	–0–	–0–
(ja)	Congenital disorders; diagnosis, special dietary treatment and counseling	PR	A	1,456,400	1,456,400
(ke)	Cooperative American Indian health projects	PR–S	A	120,000	120,000
(ky)	Interagency and intra–agency aids	PR–S	C	2,517,000	2,517,000
(kz)	Interagency and intra–agency local assistance	PR–S	C	234,100	234,100
(ma)	Federal project aids	PR–F	C	3,614,100	3,614,100
(md)	Block grant aids	PR–F	C	9,174,000	9,174,000
(na)	Federal program aids	PR–F	C	56,803,000	56,803,000
	(5) PROGRAM TOTALS				
	GENERAL PURPOSE REVENUES			20,932,700	21,413,200
	PROGRAM REVENUE			73,918,600	73,918,600
	FEDERAL			(69,591,100)	(69,591,100)
	OTHER			(1,456,400)	(1,456,400)
	SERVICE			(2,871,100)	(2,871,100)
	TOTAL–ALL SOURCES			94,851,300	95,331,800
(6)	SUPPORTIVE LIVING; STATE OPERATIONS				
(a)	General program operations; projects; council on physical disabilities	GPR	A	13,420,300	13,901,200
(dm)	Nursing home monitoring and receivership supplement	GPR	S	–0–	–0–
(e)	Principal repayment and interest	GPR	S	32,400	31,300
(ee)	Admin. exp. for state suppl to federal supplemental security income program	GPR	A	859,800	859,800
(g)	Nursing facility resident protection	PR	C	150,000	150,000
(ga)	Community–based residential facility monitoring and receivership ops	PR	C	–0–	–0–

CERTIFICATE RATES

Effective: January 10, 2001 thru January 23, 2001

Regular Certificates

Minimum	Term	Dividend	APY
$500	3 months	4.75%	4.85%
$500	6 months	5.98%	6.15%
$500	9 months	5.79%	5.95%
$500	12 months	5.60%	5.75%
$500	18 months	5.70%	5.85%
$500	24 months	5.79%	5.95%
$500	30 months	5.89%	6.05%
$500	36 months	5.70%	5.85%

Dividend Paid at Maturity

Minimum	Term	Dividend	APY
$500	12 months	5.75%	5.75%

Certificate Plus *Add to at anytime!*

Additional deposits may be added during the term of the Certificate at anytime. The minimum additional deposit is $5.00. The maximum amount that can be added during the term is $10,000.

Minimum	Term	Dividend	APY
$250	6 months	5.75%	5.90%
$250	12 months	5.37%	5.50%
$250	18 months	5.46%	5.60%
$250	24 months	5.56%	5.70%

Climbing Certificate
Add to/change dividend rate!

This Certificate gives you the opportunity to change the dividend rate to the current Climbing Certificate rate once during the 2 year term. At that time you also have option of adding or subtracting up to 25% of the principal balance.

Minimum	Term	Dividend	APY
$1000	24 months	5.56%	5.70%

Home Buyers Certificate Plus

The perfect way to save for home. Make automatic deposits to this certificate and watch it grow. You can withdraw the funds without penalty for a home purchase, as long as you finance with us.

Minimum	Term	Dividend	APY
$50	24 months	5.56%	5.70%

Certificate rates are subject to change.
Dividends are paid and compounded monthly.

ALL OF THE ABOVE CERTIFICATE TYPES CAN BE ESTABLISHED FOR AN IRA DEPOSIT.

"APY" is Annual Percentage Yield

Your funds are federally insured by the NCUA

(800) 236-5560
(608) 266-3311

DIVIDEND RATES

Effective: January 1, 2001 thru January 31, 2001

Money Market Accounts

Type	Minimum	Dividend	APY
Money Market Plus	$10,000	5.75%	5.90%
	$2,500 - $9,999	2.00%	2.02%
Capitol Account	$2,500	3.45%	3.51%

Dividend Bearing Checking

NO FEES if a $250.00 minimum balance is maintained ($3.00 per month if balance falls below $250.00). Rate varies monthly. Dividends are earned on a daily basis on a balance of $25.00 or above and paid on the last day of the month.

Minimum	Dividend	APY
$25	2.00%	2.02%

Regular Savings Account

Dividends are earned on a daily basis on a balance of $25.00 or above and paid on the last day of the month.

Minimum	Dividend	APY
$25	3.20%	3.25%

Holiday Club

Same as regular savings. Add to the holiday club using payroll deduction. Your accumulated savings and dividends will be transferred to your SCCU checking or savings account the first week of November.

Minimum	Dividend	APY
$25	3.20%	3.25%

Vacation Club

Same as regular savings. If you vacation the same time every year, we can set this account up so you receive your savings plus dividend automatically in a specified month.

Minimum	Dividend	APY
$25	3.20%	3.25%

IRA Variable

Add to it any time! Rate varies monthly. Dividends are earned on a daily basis on a balance of $25.00 or above and paid on the last day of the month.

Minimum	Dividend	APY
$25	4.00%	4.07%

STATE CAPITOL CREDIT UNION

11.1.0 Availability

An asset is available when:

1. It can be sold, transferred, or disposed of by the owner or the owner's representative, and

2. The owner has a legal title to the money obtained from sale of the asset, and

3. The person owner has the legal ability to make the money available for support and maintenance.

An asset is unavailable when the owner or owner's representative documents that the asset won't be available for 30 days or more.

Example. Sylvia has life insurance which s/he can't convert to cash within 30 days. She has a letter from the insurance company stating when s/he will receive the money. It becomes available the day s/he receives the money. Schedule an eligibility review, for no later than the 60th day after the date of application.

11.1.1 Real & Personal Property

Nonexempt real and personal property is unavailable when:

1. The person who owns the property lists it for sale with a realtor. See 11.8.0 (AFDC-related nonhome property exclusions); and 11.9.0 (SSI-related nonhome property exclusions).

2. A joint owner who is outside the fiscal test group refuses to sell the property.

   When the applicant is a co-owner of the property with someone outside the fiscal group, you must determine whether s/he is a joint owner or an owner-in-common.

   Joint ownership has a right of survivorship. That is, upon the death of one joint owner, the other inherits the share of the deceased. A joint owner's share may not be sold without forcing the sale of the entire property.

   Ownership-in-common has no right of survivorship. An owner-in-common may bequeath his/her share of the property to anyone s/he chooses. S/he may also sell his/her share during his/her lifetime.

11.1.1 Real & Personal Property (cont.)

If an institutionalized person owns property that's unavailable because it's listed for sale, s/he can use some of her income to maintain the property until it is sold. Allow minimal heat and electricity costs so as to avoid physical damage to the property while it is waiting to be sold. Also allow a minimum amount of property insurance coverage. But don't allow taxes and mortgage payments; they must be paid from the proceeds of the sale.

Allow the maintenance costs for as long as the person is making a good faith effort to sell the property, but in no case for longer than 6 months.

11.2.0 Separate & Mixed Assets

When an MA group keeps an exempt asset in:

1. A separate account or an account with other exempt assets, exempt the exempt asset:

   a. Indefinitely, for example, most payments to Native Americans (15.2.1), or

   b. For as long as the exemption can be applied to the asset, for example, EITC (11.6.6), which is exempt only through the month following the month of receipt.

2. An account mixed with other assets, some of which are nonexempt, exempt the exempt asset:

   a. For 6 months from the date the exempt asset was mixed with the nonexempt assets, or

   b. If the exempt asset has been prorated as income, exempt it for the period over which it is prorated.

11.3.0 Joint Account

Account" means a deposit of funds with a financial institution (bank, savings and loan, credit union, insurance company, etc.).

Apply the following policy to savings, checking, NOW and share accounts, certificates of deposit, and similar arrangements where the holders have equal access to the funds. Assign an equal share available to each applicant/recipient who is a holder of the joint account. "Equal share" means an amount in proportion to the number of account holders. If there are 3 holders, an equal share means each gets 1/3 of the account's balance.

Don't apply the joint account policy to the following accounts.

11.3.0 Joint Accounts

1. Accounts established for business, charitable or civic purposes.

2. Trust or restricted accounts. A trust or restricted account is one in which the person named as holder of the account has no access or limited access to the funds in it.

3. Special purpose accounts. A special purpose account has at least one holder acting as the power-of-attorney, guardian, or conservator for at least one of the other holders of the account.

11.3.1 Jointly Held Real Property

Apportion an equal share of any real property or any income derived from real property to each owner. To apportion, the equity or income must be available.

11.4.0 Burial Assets

11.4.1 Plots

A burial plot is a piece of land within the confines of a cemetery authorized under Chapter 157, Wis. Stats.

Burial plots of any value may be exempt personal property. Don't exempt more plots than the number of members in the fiscal test group. The exempted plots must be for the use of the fiscal test group members.

For an SSI-related applicant/recipient, the plot must be for the use of oneself or 1 of the following:

1. Spouse.
2. Minor or adult natural, adoptive, or step child.
3. Brother or sister.
4. Natural or adoptive parent.
5. Spouse of any of the above.

11.4.2 Burial Trusts

Exempt all burial trusts made in Wisconsin that are irrevocable by Wisconsin law. If made in another state, exempt all that are irrevocable by the laws of that state. Refer any question about any state's law to your corporation counsel.

Interest and dividends are irrevocable if they accrue to irrevocable trusts and if the trust agreement specifies they are irrevocable. If the interest or dividends are irrevocable, exempt them. If not irrevocable, do not exempt them.

11.4.2.1 AFDC-Related

In family-related Medicaid, each fiscal group member may have one or more irrevocable burial trusts, the total value of which may not exceed $1,500.

11.4.2.2 SSI-Related

In SSI-related Medicaid, each fiscal group member may have one or more irrevocable burial trusts, the total value of which may not exceed $2,000.

11.4.3 Insurance

An insurance policy purchased for the insured person's funeral expense is unavailable if:

1. It includes language that says it is irrevocable.

2. It states that all of the proceeds must be used for burial expenses.

   Note: If a burial policy calls for any excess proceeds to be paid to a secondary beneficiary, it is life insurance, not burial insurance. Similarly, if a policy calls for the proceeds to be paid to a private party who is expected but not legally required to use the funds for the burial costs of the insured, the policy is life insurance.

3. The named beneficiary signs a statement that s/he understands and accepts these conditions.

The purchase of a burial insurance policy that meets the above conditions isn't a divestment because the purchaser is presumed to receive fair market value in exchange.

A life insurance policy may name a funeral director or operator of a funeral home as the beneficiary if:

1. The person who sells the policy is not an agent of the funeral director or operator of the funeral establishment, and

2. The assignment of the proceeds is contingent on the provision of funeral merchandise or funeral services as provided for in a burial agreement.

Consider as exempt an insurance policy which names a funeral director or funeral home as beneficiary .

11.4.4 Spaces

Burial space exemptions apply only to SSI-related fiscal group members. Burial space exemptions include:

1. Vaults, caskets, crypts, mausoleums, urns, or other repositories customarily used for the remains of deceased persons,

2. Necessary and reasonable improvements upon the burial space with items such as headstones, markers, plaques, and

3. Arrangements for opening and closing the gravesite.

11.4.4 Spaces (cont.)

Exempt multiple spaces of any value under the following conditions:

1. The space(s) must be owned by the SSI-related person, that person's spouse, or, when the SSI related person is a minor, by the minor's parents.

2. Both a plot and a mausoleum space can't be exempted for the same person.

3. Each person may have more than one type of space.

4. The space(s) must be for the use of the applicant/-recipient or 1 of the following:

   a. Spouse.
   b. Minor or adult natural, adoptive, or step child.
   c. Brother or sister.
   d. Natural or adoptive parent.
   e. Spouse of any of the above.

Example. Bob S., age 12, lives with his parents and is tested for SSI-related MA. His father owns 5 burial plots and spaces: #1 is for Bob, #2 and #3 are for his parents, #4 is for his older brother, who does not live at home, and #5 is for Bob's uncle. All the plots and spaces are exempt except #5.

11.4.5 Burial Funds

Burial fund exemptions apply only to SSI-related fiscal group members. Burial funds are funds that are set aside for burial expenses. SSI-related applicants, recipients, and their spouses may each have 1 burial fund.

To find the amount of a burial fund that can be exempted, add:

1. The total amount of the person's irrevocable burial trusts.

2. The face value of all of his/her life insurance policies whose cash value is exempt.

3. The face value of his/her exempt burial insurance (11.4.3).

If the total of these is $1,500 or more, don't exempt any more burial funds. If the total is less than $1,500, subtract the total from $1,500. The result of this subtraction is the amount of his/her burial fund total that can be exempted.

11.4.5 Burial Funds (cont.)

Example. Mrs. Smith, age 74, applies for MA. She has a $1,600 savings account set aside for burial, a $1,300 irrevocable burial trust, and 2 life insurance policies, each having a cash value, with face values that total $900.Add up the values of exempted assets. The irrevocable burial trust is exempt. The life insurance cash values are exempt when the total of their face values does not exceed $1500.

$1,300 irrevocable burial trust
+900 face value life insurance
$2,200

The total is more than $1,500 so no portion of the burial fund (savings account) is exempt.

Example. This time Mrs. Smith, in addition to her $1,600 burial savings account, has:

$ 300 irrevocable trust
+1,000 face value life insurance
$ 1,300

Calculate as follows:

$ 1,500 maximum burial fund exclusion
-1,300
$ 200 Mrs. Smith can exempt $200 from her burial fund (savings account). The remaining $1,400 is an available asset

Anyone claiming a burial fund must sign a statement identifying the fund's location, type, amount, and account number. The statement must specify the month and year in which s/he first intended to set the fund aside for burial. The fund can be excluded retroactively back to the 1st day of the specified month, but no earlier than November 1, 1982. It loses its exemption if it is used for anything other than the person's burial.

The fund set aside for burial must be identifiable but not necessarily segregated from other funds.

11.5.0 **Non-Burial Trusts**

A trust is any arrangement in which a person (the "grantor") transfers property to another person with the intention that that person (the "trustee") hold, manage, or administer the property for the benefit of the grantor or of someone designated by the grantor (the "beneficiary").

11.5.0 Non-Burial Trusts (cont.)

The term "trust" includes any legal instrument or device or arrangement which, even though not called a trust under state law, has the same attributes as a trust. That is, the grantor transfers property to the trustee and the grantor's intention is that the trustee hold, manage, or administer the property for the benefit of the grantor or of the beneficiary.

The grantor can be:

1. The MA applicant/recipient.
2. His/her spouse.
3. A person, including a court or an administrative body, with legal authority to act in place of or on behalf of the applicant/recipient or the applicant/recipient's spouse. This includes a power of attorney or a guardian.
4. A person, including a court or an administrative body, acting at the direction or upon the request of the applicant/recipient or the applicant/recipient's spouse. This includes relatives, friends, volunteers or authorized representatives.

11.5.1 Trust Principal

The trust principal is the amount placed in trust by the grantor plus any trust earnings paid into the trust and left to accumulate.

11.5.2 Revocable Trusts

A revocable trust is a trust which can be revoked, canceled or modified by the grantor or by a court. A trust which is called irrevocable, but which will terminate if some action is taken by the grantor, is considered a revocable trust.

The trust principal of a revocable trust is an available asset.

11.5.3 Irrevocable Trusts

An irrevocable trust is a trust that cannot, in any way, be revoked by the grantor.

The trust principal of an irrevocable trust is not an available asset.

Note: If the grantor is an institutionalized person, or someone acting on behalf of an institutionalized person, setting up an irrevocable trust may be a divestment (14.12.2)

11.5.4 Special Needs Trust

Disregard special needs trusts whose sole beneficiary is under age 65 and totally and permanently disabled (under SSI program rules) if it meets these conditions.

a. The trust must be established for the sole benefit of the disabled person by his/her parent, grandparent, legal guardian or a court **and**

b. Contain a provision that, upon the death of the beneficiary, the Wisconsin MA program will receive all amounts remaining in the trust not in excess of the total amount of MA paid on behalf of the beneficiary.

The exception continues after the person turns 65, provided s/he continues to be disabled. However, a grantor cannot add to the trust after the beneficiary turns 65. Anything added to the trust after the beneficiary turns 65 is a divestment. Money added before the beneficiary turns 65 is not a divestment.

11.5.5 Pooled Trusts

Disregard pooled trusts for disabled persons. They must meet the following conditions:

a. Established and managed by a non-profit association.

b. A separate account is maintained for each beneficiary. For purposes of investment and management, the funds from separate accounts may be pooled together.

c. The sole beneficiaries are persons determined disabled under SSI program rules.

d. Contain a provision stating that upon the death of the beneficiary the trust will use remaining funds in the account to reimburse the Wisconsin MA program.

11.6.0 Liquid Assets

11.6.1 Personal Property

Personal property in general includes money, goods, cause of action, damages for breach of contract, and evidences of debt. Value of personal property means market value. Deduct all encumbrances to arrive at a final evaluation. Count household effects, libraries, and jewels only if of unusual value.

11.6.2 Loans

If an AG member receives a loan and it's available for current living expenses, count it as an asset. Do this even if there's a repayment agreement. If it isn't available for current living expenses, disregard it.

If an AG member makes a loan (except a land contract), treat the repayments as follows:

1. Count any repayments toward the principal of the loan, whether it is a full payment, a partial payment, or an installment payment, as an asset.

2. Count any interest payment on the loan as unearned income in the month received, and as an asset in the months following the month it was received.

11.6.2.1 Reverse Mortgage

A reverse mortgage loan is a loan, or an agreement to lend, which is secured by a first mortgage on the borrower's principal residence. The terms of the loan specify regular payments to the borrower. Repayment (through sale of the residence) is required at the time all the borrowers have died, or when they have sold the residence or moved to a new one.

Treat reverse mortgage loan payments to the borrower as assets in the month received and thereafter. Do not count undisbursed funds (not yet paid to the borrower) as assets. They are considered equity in the borrower's residence.

11.6.3 HUD Payments

Disregard reimbursements resulting from federal regulatory changes in computing US Department of Housing and Urban Development (HUD) housing rent as income in the month paid and assets in the next month.

11.6.4 Annuities

An annuity is a written contract under which, in return for payment of a premium or premiums, an individual will receive a series of payments at regular intervals for a specified time period.

The annuitant is the person entitled to the payments. A purchaser can name himself/herself or another person as the annuitant. The purchaser may also name a beneficiary to receive annuity payments after the annuitant's death.

11.6.4.1 Accumulation Phase

The accumulation phase of an annuity is the period when the purchaser puts money into the annuity. During the accumulation phase, an annuity is an available asset because the annuitant can cash it in for its cash value.

Cash value (also known as surrender value) equals:

1. Total deposits made to the annuity.
   +
2. Earnings on the deposits not previously paid out.
   -
3. Withdrawals and surrender costs charged for withdrawal.

In determining the cash value, do not deduct income tax withheld or tax penalties for early withdrawal.

11.6.4.2 Pay-Out Phase

The pay-out (annuitization) phase begins at the time payments start going to the annuitant in accordance with the settlement option.

The settlement option specifies the way the funds from the annuity will be paid out. It involves choosing the amount of each payment, how often payments will be made, and the length of time over which the payments will be made.

An annuity becomes an unavailable asset on the date the settlement option is made final. This means even if the payment starts months later, it is unavailable on the date the settlement option is made final.

11.6.5 Life Insurance

Face value is the basic death benefit of the policy exclusive of dividend additions or additional amounts payable because of accidental death or under other special provisions.

Cash value means the net amount of cash for which the policy could be surrendered after deducting any loans or liens against it.

Count the cash value of all life insurance policies. For persons age 65 or over, blind or disabled, count it only when the total face value of all policies owned by each person exceeds $1,500. Do this calculation for each SSI related person. In determining the face value don't include any life insurance which has no cash value.

Life insurance policies always have a face value, but don't always have a cash value. Term life insurance is limited to a defined time period as stated in the policy and doesn't usually have cash value. Group life insurance is usually term insurance and usually has no cash value. An endowment insurance plan generally has cash value.

11.6.6 Endowment to CCRC

Frequently, in order to enter a continuing care retirement community (CCRC), a person must pay a large, one-time entrance fee as an endowment. In exchange for this and, sometimes, an additional monthly payment, the person is promised care for the rest of his/her life, unless s/he chooses to move.

Endowments such as this are unavailable assets.

11.6.7 Income Tax Refunds

Federal and state income tax refunds are available assets.

11.6.8 EITC

Disregard all Earned Income Tax Credit (EITC) payments in the month received and in the month after receipt.

After the "month received' and the "month after receipt" have passed, count the EITC payment as an available asset.

11.6.9 Vehicles

A vehicle is any:

1. Passenger car or other motor vehicle
2. Used to transport persons or goods, and
3. Owned by someone in the fiscal test group.

In an AFDC-related case, don't test any tractor, truck, or other farm vehicle used directly in producing farm income.

In all cases, log skidders (used to move logs out of the woods to market) are exempt vehicles.

11.6.9.1 Determining Equity Value

Equity value is:

1. The vehicle's wholesale value as given in a standard guide on motor vehicle values (blue book), or the value as estimated by a sales representative at a local dealership;
2. Minus any encumbrances (loans or mortgages) that are recorded on the vehicle's title as liens.

Don't increase a vehicle's value by adding the value of low mileage or other factors, such as optional equipment or apparatus for the handicapped.

Occasionally , a vehicle has more than 1 owner. Some of the owners may be in the fiscal test group, others not. To find what the fiscal test group's equity value in the vehicle is, do the following:

1. Find the vehicle's wholesale value.
2. Subtract the encumbrances (loans or mortgages) that are recorded as liens on the vehicle's title. The result is the equity value.
3. Divide the equity value by the total number of owners.
4. Add up the prorated equity values of the owners who are in the fiscal test group. The result is the fiscal test group's equity value in the vehicle.

11.6.9.2 When to Count, When to Exempt

Count vehicle values as follows:

1. AFDC-MA (MA R, MA U) and AFDC-Related cat needy MA (MAOU and MAOR), when the fiscal group owns:

   a. One vehicle, exempt up to $1,500 of its equity value. Count the equity value above $1,500.

   b. Two or more vehicles, exempt up to $1,500 of the equity value of the vehicle with the highest equity value. Count the equity value above $1,500 of the vehicle with the highest equity value, and count the full equity value of all other vehicles.

2. AFDC-related, medically needy MA (NAOR), when the fiscal group owns:

   a. One vehicle, exempt it.

   b. Two or more vehicles, exempt 1 (as in a. above) and exempt a 2nd vehicle if it is necessary for employment or to obtain medical care.

   Count the full equity value of all vehicles not exempted in a. or b. above.

3. SSI-related categorically and medically needy MA, when the fiscal group owns:

   a. 1 vehicle, exempt it if it meets 1 of the following conditions:

      Necessary for employment, or

      Necessary for medical treatment of a specific or regular medical problem, or

      Modified for operation by or transportation of a handicapped person, or

      Necessary because of climate, terrain, distance or similar factors to provide transportation to perform essential daily activities.

11.6.9.2 When to Count, When to Exempt (cont.)

   b. 1 vehicle and it does not meet any of the above conditions, exempt it if its fair market value does not exceed $4,500. Fair market value in excess of $4,500 counts toward the asset limit.

   c. 2 or more vehicles, count the full equity value of all vehicles except for the 1 vehicle that meets the conditions of either a. or b. above.

11.6.10 Property Settlement

Money received as a property settlement is always an asset regardless of whether it's paid in one payment or in installments. It's never income.

11.6.11 Lump Sums

Lump sum payments (rather than recurring payments) from such sources as insurance policies, sale of property, Railroad Retirement, Unemployment Compensation benefits, and retroactive corrective financial aid payments are counted as an asset when received.

11.6.11.1 Retroactive SS Payments

Do not count a retroactive social security or SSI payment as an asset for 6 months, beginning with the month the payment is received. A retroactive payment means it is paid later than the month in which it is due. After 6 months, treat any remaining available portion as an asset.

During the 6 months in which it is not counted, the unspent portion of the payment can be mingled with other funds, provided it can be distinctly and separately identified.

11.6.12 Land Contract

When a land contract is executed, the purchaser builds equity in the property through the payments s/he makes. The seller keeps legal title to the property until it is paid for. The seller's interest in the land contract is personal property, not real property.

The seller's legal title to the property can be sold and converted to cash for support and maintenance. To determine the value of the seller's legal interest in the land contract:

1. Find the original sale price or the fair market value (as determined by a qualified real estate appraiser). Of these 2 amounts choose the one which more accurately reflects the contract's true value on the date it was originated:

11.6.12 Land Contract (cont.)

2. From this amount subtract:

   a. Payments which the purchaser has already made on the principal.

   Example. The fair market value of the land contract is $50,000. The purchaser has already paid $10,000 on the principal.

   $ 50,000 Fair Market Value)
   -10,000 Already Paid
   $ 40,000 Outstanding Balance

   b. Encumbrances on the contract, for example, a personal loan.

   c. The amount lost to a discount.

   Example. Milton Rokeach wants to buy up Mr. Graham's land contract. He asks for a 10% discount.

   $40,000 Outstanding Balance
   - 4,000 10% Discount Given by Mr. Graham to Milton Rokeach
   $36,000 Value of Mr. Graham's Interest in the Land Contract.

3. The remainder, after subtracting a., b., and c. from the original sale price, is the value of the seller's interest in the land contract. Count this as an available asset.

If the land contract isn't an available asset, the person must document its unavailability by showing that either: (1) the terms of the land contract prohibit its sale, or (2) no one is willing to purchase it from him/her.

When the claim is that no one will purchase the land contract, it must be offered for sale to at least one individual or organization active in the land contract purchasing market. A written statement from the individual or organization that they won't buy it is sufficient to establish the land contract as an unavailable asset.

Notice that if it has been offered only to an individual or organization that never purchases land contracts, it remains an available asset.

11.6.13 Mortgage

Treat any mortgages held by and owed to an applicant or recipient the same as a land contract.

11.6.14 Wisconsin Higher Education Bonds

The State of Wisconsin sells Wisconsin Higher Education Bonds to the public as a way to save for higher education. To determine their net value, subtract broker's fees from market value.

The bonds may be sold back to the State, under certain time restraints:

1. Before the maturity date, a portion of their value is withheld. The amount withheld equals the school's tuition and fees. Any excess goes to the person.

2. On or after the maturity date, the value is the total amount received.

The bonds may be sold on the "secondary" bond market at any time. Since they can be disposed of on the market with no time limit they are an available asset. To determine their net value, subtract broker's fees from market value. (Verify the amounts through a broker.)

11.6.15 Wartime Relocation of Citizens

Disregard restitution paid under PL 100-383 to Japanese-Americans and Aleuts or their survivors who were interned or relocated during WW II.

11.6.16 Agent Orange Settlement Fund

Disregard payment received from the Agent Orange Settlement Fund or any other fund established in settling "In Re Agent Orange product liability Settlement Fund litigation, M.D.L. No. 381 (E.D.N.Y.)". Disregard as income in the month received and as an asset forever after.

11.6.17 Radiation Exposure Compensation Act

Disregard payments from any program under the Radiation Exposure Act (PL 101-426) paid to persons to compensate injury or death resulting from exposure to radiation from nuclear testing ($50,000) and uranium mining ($100,000).

When the affected person is dead, payment is made to his/her surviving spouse, children, parents, or grandparents. The federal Department of Justice reviews the claims and makes the payments.

Apply this disregard retroactively to 10-15-90 and continue to disregard the payment for as long as it is identified separately.

11.6.18 Institutionalized Person's Assets

An institutionalized person's personal allowance may accumulate to where s/he may lose eligibility due to excess assets. To prevent this, s/he can spend money on personal needs or make a refund to the agency. If s/he chooses to refund the agency, calculate what a year's accumulation will be and work out a payment schedule. When the payments equal MA benefits received, have the person stop the payments until s/he receives more benefits.

If the person refuses to refund, discontinue eligibility when the asset limit is exceeded. S/he remains ineligible until the assets are again at or below the limit. At that point s/he may reapply.

These instructions apply to all institutionalized MA recipients, whether certified by your agency or by the Social Security Administration.

11.6.19 Blind/Disabled Set-Aside

Disregard the following for a blind or disabled person:

1. Assets essential to the continuing operation of her/his trade or business.
2. Other income-producing property.
3. Assets set aside to carry out an approved self-support plan. The set-aside must be segregated from other funds. Disregard interest that accumulates, provided the set-aside does not exceed the provisions of the plan.

11.6.20 Replacing and Repairing Exempt Assets

Vehicles and homes are examples of exempt assets. If an exempt asset is lost, stolen, or damaged, disregard any cash (and interest earned) or in-kind replacement received from any source to repair or replace it.

The cash or in-kind payment must be used within 9 months of the date it is received. After the end of the 9th month, count as an asset leftover cash not used for the repairs or replacement.

Extend the 9 month period for up to another 9 months if the person has good cause for not repairing or replacing the thing. Good cause means: circumstances beyond the person's control prevent repair or replacement. This includes not being able to contract it out. When there is good cause, count as an asset any amount not used for repairs or replacement. Begin with the month after the end of the extension.

11.6.20 Replacing and Repairing Exempt Assets (cont.)

If, during a good cause extension, the person no longer intends to replace or repair the exempt asset, count the amount for replacement or repair as an asset. Begin with the month the person reports his/her change of intent.

11.6.21 Retirement Benefits

Treat as an asset all retirement funds that are available for withdrawal by a fiscal group member unless s/he:

- is an ineligible spouse in an SSI-related case or
- has to quit a job to get the retirement funds.

Disregard any retirement funds or IRA's of an ineligible spouse in an SSI related case. Retirement funds for this purpose are funds held in individual retirement accounts (IRA's), as described by the Internal Revenue Code, or in work-related pension plans (including such plans for self-employed individuals, sometimes referred to as Keogh plans). This includes the community spouse in spousal impoverishment cases.

11.6.22 Gifts

A gift is something a person receives which is not repayment for goods or services the person provided and is not given because of a legal obligation on the giver's part. To be a gift, something must be given irrevocably (that is, the donor relinquishes all control).

A gift is unearned income. Accept an individual's signed estimate of the value of the gift (or actual value, if cash) unless you have reason to doubt the estimate. If you doubt the estimate, determine the item's current market value with an independent source.

A cash gift is <u>income</u> in the month of receipt. It is an <u>asset</u> in the months after the month of receipt. Disregard cash gifts (such as for birthdays, graduation, and Christmas) that total $30 or less, for each assistance group member, for each calendar quarter.

11.6.23 US Savings Bonds

Count the cash value of a US Savings Bond unless it is unavailable. A bond is unavailable only if the MA group proves it tried to cash the bond and was refused.

11.6.24 Zebley Payments

Disregard all SSI payments received by anyone as a result of the Zebley <u>v</u>. Sullivan decision. Do not count it as income or a lump sum in the month received. Do not count it as an asset even if the family keeps the money and does not spend it.

11.6.25 Indian Judgment Fund Purchases	Disregard assets purchased with Indian judgment funds (15.2.1, #10). But don't disregard: 1. Proceeds from the sale of these initial purchases. 2. Subsequent purchases made with the proceeds from the sale of these initial purchases
11.6.26 Payments to Nazi Victims	Disregard payments made under PL 103-286 to victims of Nazi persecution.
11.6.27 Spina Bifida Child	Disregard payments made under PL 104-204 to any child of a Vietnam veteran for any disability resulting from the child's spina bifida.
11.6.28 Uniform Gifts to Minors Act	Count funds held in an account for the benefit of a minor that are the result of transfers under the Uniform Gifts to Minors Act. This act is also called the Uniform Transfers to Minors Act. The funds are available when determining eligibility for the minor unless a court determines otherwise.
11.6.29 IDA Programs	IDA stands for Individual Development Accounts. These are restricted accounts owned by low-income people and the IDA program provides matching funds for buying a home, starting a business, or post-secondary education. Client savings and interest are a countable asset if the IDA were established using the Assets for Independence Act or Refugee Assistance Act funds. However, if W-2 or Community Reinvestment funds support the IDA program, the assets are exempt.
11.7.0 <u>Home Property</u>	A home is a place of abode and lands used or operated in connection with it. In urban situations the home usually consists of a house and lot. A home can consist of a house and more than one lot. As long as the lots adjoin one another, they are considered part of the home. In farm situations the home consists of the house and buildings together with the total acreage property upon which they are located and which is considered a part of the farm. There will be farms where the land is on both sides of a road and considered a part of the home.

11.7.1 Multiunit Dwelling	When an MA fiscal group member lives in 1 unit of a multi-unit dwelling and owns all of the units, exempt all of the units and the property they are on. Consider the whole multiunit dwelling as the group member's home.
11.7.2 Trailer Homes	A trailer home that isn't used as a home is: 1. Nonhome property if it's on nonhomestead land owned by the trailer owner, or 2. Personal property if it's on land not owned by the trailer owner, or 3. Exempt if it's on homestead property.
11.7.3 Exempt Home Property	Although home property is an exempt asset under the conditions described in this subsection, there are limits on divesting home property. See 14.2.3.1. <u>Non-Institutionalized Person</u>. For a person who is not residing in an institution, the home is exempt as long as the person resides in it, or intends to return to it. There is no time limit for an intended return. The home remains exempt even if the person rents out part of it while s/he continues to reside there. <u>Institutionalized Person</u>. When a person resides in an institution, the home is exempt if one of the following conditions is met: 1. His/her spouse or dependent relative resides in the home. The dependency of the relative may be of any kind, such as financial or medical. The relative may be father, mother, daughter, son, grandson, granddaughter, in-laws, stepmother, stepfather, stepson, stepdaughter, grandmother, grandfather, aunt, uncle, sister, brother, stepbrother, stepsister, halfsister, halfbrother, niece, nephew, or cousin. 2. The institutionalized person expresses his/her intent to return to the home. If s/he is able to form an intent but unable to express it, determine his/her intent through other available evidence. Other evidence includes: a. His/her written statements.

11.7.3 Exempt Home Property (cont.)

b. His/her oral statements made before incapacitation. Accept reports of these statements made by family members.

c. Accept reports of his/her intent made by an authorized representative (IMM I-A). If there is no evidence s/he disagrees with the statement, accept the authorized representative's statement.

If s/he appears unable to form an intent but has not been judged incompetent by a court, accept a family member's statement as evidence of his/her intent.

If s/he has been judged incompetent, accept the intent statement of his/her guardian. Use the guardian's intent statement even if it differs from the applicant/recipient's.

If neither condition #1 nor #2 is met, the property is no longer the principal residence and becomes nonhome property.

11.7.4 Sale of Home Property

Money from the sale of real property is an asset. When the property that is sold is a homestead:

1. AFDC-related MA counts the proceeds as available at once unless they are immediately absorbed in the purchase of another home.

2. SSI-related MA allows the proceeds to be disregarded if they are placed in an escrow account and used to purchase another home within 3 months.

11.7.5 Life Estate

A life estate gives a person certain property rights for his/her lifetime. S/he has the right to possess and use it, and to make money from it. S/he also has the right to sell his/her interest in it.

The person doesn't have title to or the right to sell the property. S/he usually may not pass it on to his/her heirs as an inheritance. S/he is liable for all costs of the property such as taxes and repairs, unless s/he moves off the property or the will (or deed) states otherwise.

When property is conveyed to one person for life (life estate holder) and to another person (the remainder man), both a life estate interest and a remainder interest are created. When the life estate holder dies, the remainder man holds full and unconditional title to the property and can dispose of it as s/he wishes (fee simple).

11.7.5 Life Estate (cont.)

A life estate or remainder interest in homestead or non-homestead property is an unavailable asset. To determine the value of a life estate or remainder interest:

1. In the Life Estate and Remainder Interest Table (30.2.0) find the line for the person's age as of the transaction date.
2. Multiply the figure on that line in the Life Estate or Remainder column times the fair market value to determine the value of the life estate or remainder interest.

When a life estate holder moves off the property and the property is rented, follow the instructions in 15.5.3 for counting the rental income.

11.8.0 AFDC-Related Non-home Property Exclusions

Non-home property is any asset other than a homestead. If the value of the non-home property doesn't exceed the categorically needy asset limit, an otherwise eligible person may be eligible for Medicaid and keep the property.

If it exceeds the categorically needy asset limit but the non-home property isn't available (11.1.0), exclude the property's value from the asset total.

If it's available, the owner must agree in writing to sell the property within 9 months. Use the Real Property Agreement (35.11.8.1).

In the effort to sell the property, the owner must list it with a realtor at a fair market value. During the 9 months, don't count the property in the asset total. If it isn't disposed of in 9 months, reevaluate it's fair market value and include it in the asset total.

The 9 month period runs consecutively unless there is at least one complete month break in eligibility. The first agreement signed will be anticipated to cover 9 months. Each time there is a break in eligibility have another agreement signed if the full 9 month period was not allowed.

Example: Applicant signs a 9 month agreement. MA is discontinued after 5 months. If client reapplies at a later date and still owns the excess property, have him/her sign another agreement which allows a 4 month disposal period.

An AFDC-related group is allowed a total of 9 months for each separate parcel of excess real property. The 9-month limit applies even when an AFDC-related group becomes ineligible sometime during the original agreement period. If the group reapplies, and the property has not been disposed of within 9 months of the original agreement, the group is ineligible.

11.9.0 SSI-Related Nonhome Property Exclusions

Nonhome property is any countable asset other than a homestead. See 14.4.0 for divestment. Exclusions of nonhome property in SSI-related cases include:

1. Real Property that is listed for sale with a realtor at a price consistent with it's fair market value.

2. Property excluded regardless of value or rate of return. Property used in a trade or business is in this category. See Appendix 22.3.1.2.

3. Property excluded up to $6,000, regardless of rate of return. This category includes nonbusiness property used to produce goods or services essential to self-support. Any portion of the property's equity value in excess of $6,000 is not excluded.

   Nonbusiness property essential to self-support can be real or personal property. It produces goods or services essential to self-support when it is used, for example, to grow produce or livestock solely for personal consumption, or to perform activities essential to the production of food solely for home consumption.

4. Property excluded up to $6,000 if it is nonbusiness property that produces a net annual income (either cash or in-kind income) of at least 6 percent.

If the excluded portion produces less than a 6% return due to circumstances beyond the person's control (e.g., crop failure, illness), and there is reasonable expectation that it will again produce at least a 6% return, continue to consider the first $6000 in equity as excluded.

11.10.0 Indian Lands

Exclude a Native American's interest in or possession of land which is held by an individual Native American or tribe, and which can only be disposed of with the approval of other individuals, the tribe, or the Federal government.

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In The

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Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY TO BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY TO BRIEF IN OPPOSITION

This brief is submitted in reply to that of respondent Irene Blumer, who opposes the Petition for Writ of Certiorari.

I. REVIEW IS APPROPRIATE BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH UNANIMOUS FEDERAL AND STATE HIGH COURT PRECEDENT AND WITH THE VIEWS OF THE FEDERAL ADMINISTERING AGENCY, BECAUSE AN IMPORTANT FEDERAL QUESTION IS PRESENTED AND BECAUSE THAT QUESTION SHOULD NOW BE RESOLVED BY THIS COURT.

Respondent concedes, as she must, that the decision below directly conflicts with unanimous federal and state high court precedent and with the views of the administering federal agency (respondent's brief at 1). However, she unfairly minimizes the importance of the federal question presented.

That question is whether the "income first" requirement of the Wisconsin Medical Assistance (MA or Medicaid) statute, requiring that the income of an institutionalized spouse be attributed to the community spouse to provide for the latter's monthly maintenance needs, conflicts with the spousal impoverishment provisions of the federal statute, 42 U.S.C. § 1396r-5. Essentially the same question, arising under the laws or policies of Ohio and New Jersey respectively, has been presented to this Court twice in recent years. *See Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 525 U.S. 964, 119 S. Ct. 408 (1998) (*see* Petition No. 98-360 at i); *Cleary ex rel. Cleary v. Waldman* ("*Cleary II*"), 167 F.3d 801 (3d Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 170 (1999) (*see* Petition No. 99-49 at i).

In *Chambers*, the petitioners (a class of elderly couples seeking Medicaid for the institutionalized spouse under the spousal impoverishment provisions of state and federal law) forcefully argued that whether the states have discretion to impose an "income first" policy or are required, as the court below did here, to employ a "resource first" approach, was a question "national in scope, vital in nature, and likely to arise again" (original bolding deleted). *See* Petition No. 98-360 at 26-28. The *Cleary* petitioners made a similar argument concerning the national significance of the question presented for the administration of the spousal impoverishment provisions of 42 U.S.C. § 1396r-5. Here, the petitioner Wisconsin Department of Health and Family Services (Department) also submits that this case presents a significant federal question concerning the scope of the states' discretion to administer the spousal impoverishment provisions of the federal law in accordance with state attribution of income requirements (*see* petition at 15 and 18-20).

In support of its argument on the significance of the federal question, the Department attempted to provide a rough estimate of the fiscal impact of the decision below on Wisconsin Medicaid costs. The petition also suggested that the answer by this Court to the question of law presented could have a significant fiscal impact on MA costs in the approximately three dozen other states which also employ an "income first" approach via statute, rule or policy (*see* petition at 18-21).[1] While respondent disputes the significance of the federal question presented, she does so *only* on fiscal grounds and does not argue that the question of law presented for this Court is not serious or important (*see* respondent's brief at 1-7). Indeed, a comparison between

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[1]Obviously, the Department did not mean to suggest that the decision below would itself have a direct effect on MA costs anywhere except Wisconsin. The Department regrets any such misinterpretation of the Petition.

Blumer's relatively detailed argument on the merits of the question presented (*see* respondent's brief at 7-15) and the thoughtful, well-reasoned Court of Appeals' decisions in *Chambers* and *Cleary II* neatly demonstrates that the federal question presented is significant.

While Blumer does not argue that the question of law presented lacks gravity or importance, she does attack the Department's arithmetic and the source of its fiscal impact figures.[2] Although the Department acknowledges that its fiscal impact estimates are rough and for purposes of illustration only, there appear to be two basic points that Blumer cannot dispute. First, while the estimated annual cost to the Wisconsin Medicaid program of $2.4 million for each 100 new cases (*cf.* petition at 20; respondent's brief at 3-4) may pale in comparison with the total state MA budget, $2.4 million is undeniably a significant amount of money. Indeed, that figure rivals or exceeds the total annual cost of many other worthy health care or social services programs.

Secondly, respondent does not seriously dispute that, regardless of what the rate of return may be, a significant amount of resources is necessary to generate income of $992 monthly or $11,928 annually (*cf.* petition at 19-20; respondent's brief at 4-7). Moreover, there are many couples

[2]The Department acknowledges that the records on which the rough impact estimate is based are not in the record at this time, although the records supporting the median attribution amount of $992 per month and the total additional MA cost per month (*see* petition at 19-20) are public and available to respondent or her counsel. Blumer attacks the Department's concededly rough average length of stay estimate of 50 months based on data contained in a recent report published by the Department (*see* respondent's brief at 3; R. App. 2a). The Department suggests, however, that because of scope and other limitations of the survey, the figures in the report are themselves not entirely reliable or correct for the particular purpose Blumer uses them. For these and other reasons, the Department relies on the 50-month figure simply to illustrate its basic argument that the costs of the "resource first" approach mandated by the court below will be substantial.

with substantial assets who are likely to take advantage of the prospect, now available to them under the "resource first" approach mandated by the court below, of sheltering assets far in excess of the ordinary resource allowance. And the number of those couples will rise predictably when elder law practitioners and financial planners adjust planning strategies in response to the decision below. Thus, the Department fully adheres to its basic point that the actual and potential fiscal impact of the decision below is an aspect of the significant federal question presented which cannot be ignored.

While this case raises essentially the same important federal question presented to this Court in *Chambers and Cleary II*, there are two crucial differences between the posture of this case and that of *Chambers* and *Cleary II* which now warrant this Court's review. Most importantly, there is now a direct conflict between the decision below and unanimous federal and state high court precedent that did not exist in those two cases. In addition, the Department submits, in *Chambers* and *Cleary II*, the Third and Sixth Circuits correctly decided the federal question presented based on the language of the statute and the federal policies the statute is intended to serve, while, in this case, the court below did not.

The question presented here has percolated through a variety of state and federal courts. Further percolation would not be useful because the nature of the dispute has now crystallized and the respective opposing public and private interests are well defined in the cases, including this one. The significance of the issue for the administration of the spousal impoverishment provisions of the Medicaid Act by the states is not seriously disputed.

It is clear that this Court will ultimately have to resolve the important federal question presented and this case is the appropriate vehicle for deciding it.

II. REVIEW IS APPROPRIATE BECAUSE THE COURT BELOW WAS WRONG: THE STATUTORY LANGUAGE IS AMBIGUOUS AND THE "INCOME FIRST" APPROACH REQUIRED BY WISCONSIN LAW IS A REASONABLE, PERMISSIBLE INTERPRETATION OF 42 U.S.C. § 1396r-5.

A full discussion of the merits of the question presented is neither appropriate nor possible in this brief. However, a limited reply to Blumer's relatively extended argument on the merits is necessary to reinforce the significance of the question presented and to outline why the court below was wrong in concluding that 42 U.S.C. § 1396r-5, particularly subsection (e)(2)(C), does not permit the "income first" approach required by Wis. Stat. § 49.455(8)(d).

The claim by the court below--and by Blumer--that 42 U.S.C. § 1396r-5(e)(2)(C) unambiguously requires the "resource first" approach and that all the other federal and state high courts who reached the opposite conclusion are wrong, demonstrates the existence of ambiguity more tellingly than pages of textual argument by the Department. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (observing that existing conflict between court decisions alone was sufficient to establish that the wording of the statute was ambiguous). The fact that courts have derived two diametrically opposed readings from the language of 42 U.S.C. § 1396r-5(e)(2)(C) itself illustrates the ambiguity of that provision and the resulting need for statutory interpretation.

Analyzing 42 U.S.C. § 1396r-5 using the ordinary tools of statutory construction, it is apparent that the "income first" policy required by Wisconsin law is a reasonable

interpretation of that statute. First, the view that states have discretion under the spousal impoverishment provisions of 42 U.S.C. § 1396r-5 to employ the "income first" policy is based on a reasonable reading of the language of the statute itself.

Blumer insists, however, that subsection (e)(2)(C) deals "exclusively with asset eligibility determinations" and is "essentially unrelated" to the provisions of subsection (d) which protect income for the community spouse after a determination of eligibility (*see* respondent's brief at 8-9). This wooden view of the interrelationship of the provisions of 42 U.S.C. § 1396r-5 has been rejected in *Cleary II*, in *Chambers* and in other cases as well. *See id.*, 145 F.3d at 801-03; *Cleary II*, 167 F.3d at 808-10. Rather, according to *Cleary II*, subsections (b) and (d) make clear "that a certain portion of the community spouse's income may come from the income of the institutionalized spouse." *Id.* at 809. The court continued:

> The purpose of subsection (d) is to make available to the community spouse so much of the institutionalized spouse's income as is necessary to ensure her monthly need. We agree that "it would be anomalous to construe (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation."

Id., 167 F.3d at 809, quoting *Cleary v. Waldman* ("*Cleary I*"), 959 F. Supp. 222, 232 (D.N.J. 1997). The myopic reading of the language of subsection (e)(2)(C) adopted by the court below and by respondent is simply not required by a reading of that provision in the context of the spousal impoverishment statute as a whole.

Respondent's claim that the informal views of the Health Care Financing Administration (HCFA), the federal administering agency, and of the Department of Health and Human Services (DHHS) Secretary have been "inconsistent" and are, therefore, not entitled to deference is disingenuous, if not simply inaccurate. In fact, HCFA and DHHS have been entirely *consistent* in viewing the "income first" approach as a permissible interpretation of 42 U.S.C. § 1396r-5 (*see* Pet. App. 78a-90a). *See also Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 800 and 803.

At 11-13 of her brief, Blumer discusses the legislative history of subsection 5(e)(2)(C), arguing that the Conference Committee covertly inserted a "resource first" requirement into that subsection, despite the fact that the Conference Committee eliminated an express "resource first" provision appearing in the Senate-approved version of the bill. This is a counter-intuitive interpretation of the legislative history that is not supported by the Conference Committee Report itself.

The Conference Committee's own description of the legislative compromise that resulted in the fair hearing provisions of 42 U.S.C. § 1396r-5(e) stated:

> The agreement does not exclude from countable resources those assets necessary to produce income available to the community spouse . . . . Instead, the agreement provides that either . . . spouse may request a fair hearing as to whether the community spouse resource allowance is adequate . . . . If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the

> community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 100-661, at 257 (1988), *reprinted in* 1988 U.S.C.C.A.N. 803, 1043 (emphasis supplied).

Furthermore, Blumer's interpretation of the legislative history has been soundly rejected by the courts. *See Cleary II*, 167 F.3d at 811; *Chambers*, 145 F.3d at 803-04 ("The legislative history of the statute does not indicate the requirement of a single approach to revising the community spouse resource allowance.").

In short, the court below wrongly decided the federal question presented and review by this Court is appropriate.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of *certiorari* to review the decision of the Wisconsin Court of Appeals, District IV.

Respectfully submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

PETITIONER'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

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Petitioner Department respectfully submits that the Solicitor General's argument does not support the conclusion that this Court should deny certiorari. Rather, the analysis of the question presented by the Solicitor General demonstrates, with remarkable clarity, why this Court should *grant* certiorari.

The Solicitor General candidly acknowledges that the criteria justifying a grant of certiorari are fully presented in this case:

- The decision of the Wisconsin Court of Appeals conflicts with the decisions of two federal courts of appeals and of two state high courts, each of which has upheld the income-first methodology (*see* Solicitor General's Brief (Brief) at 10-14 and 16).

- The case concerns a matter of substantial importance to the states and to Medical Assistance (MA) claimants in the administration of the MA program (*see* Brief at 11 and 13).

- The decision of the court below holding that 42 U.S.C. § 1396r-5(e)(2)(C) unambiguously forbids use of the income-first methodology is incorrect, and is inconsistent with the legislative history of that provision and with the language of the spousal impoverishment statute as a whole (*see* Brief at 10 and 13-17).

Despite the existence of the criteria supporting a grant of certiorari, the Solicitor General argues that review is inappropriate simply because the Department of Health and Human Services (HHS) now intends to publish a notice of proposed rulemaking within the next 90 days (*see id.* at 11-12 and 17-24). Even if HHS eventually develops administrative rules concerning the spousal impoverishment provisions of 42 U.S.C. § 1396r-5, however, that process will require a

minimum of several years.[1] Meanwhile, Wisconsin will be required to abide by what the Solicitor General persuasively demonstrates is a fundamentally erroneous decision of the Wisconsin Court of Appeals at a cost of millions of dollars to Wisconsin alone. *See* Brief at 13 and 23.[2]

Moreover, the fundamental question squarely presented here will remain unresolved, and, in fact, cannot be resolved by the HHS rule-making process. In this case *and* under future HHS rules, the preliminary questions remain: Does 42 U.S.C. § 1396r-5(e)(2)(C) plainly and unambiguously foreclose the income-first methodology, as the court below held? Or is it silent or ambiguous so as to permit use of the income-first methodology, as federal and state high courts have held? *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984). Thus, the question whether 42 U.S.C. § 1396r-5(e)(2)(C) permits or forecloses the income-first methodology used by Wisconsin and many other states will not be resolved by promulgation of HHS rules but must be decided finally by the courts.

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[1]The complexity of the MA program and the procedure for adopting administrative rules typically require five or more years to finalize a particular set of rules. Two recent MA rules required six years and eight and one half years, respectively, for promulgation (*see* Medicaid Home and Community-Based Waiver rules published at 59 Fed. Reg. 37702 (July 25, 1994); and rules governing "Deduction of Incurred Medical Expenses (Spenddown)" published at 59 Fed. Reg. 1659-61 (Jan. 12, 1994)).

[2]*Batterton v. Francis*, 432 U.S. 416 (1977) is inapposite to the grant or denial of certiorari in this case. The question presented the first time that case came before this Court was whether a state rule conflicted with a federal rule, and a revised federal rule was "then-forthcoming." *Id.* at 421. Furthermore, the claimed conflict here is whether the state rule conflicts with the federal statute itself, not, as in *Batterton*, with a federal regulation.

Absent a grant of certiorari, the only logical and just disposition based on the Solicitor General's brief is summary reversal of the decision of the court below under Rule 16.1. As the Solicitor General persuasively demonstrates, the Wisconsin Court of Appeals' decision that 42 U.S.C. § 1396r-5(e)(2)(c) unambiguously forbids use of the income first methodology is simply wrong. Moreover, the income-first methodology is an entirely reasonable interpretation of the existing spousal impoverishment statute. *See* Brief at 10 and 13-17.

CONCLUSION

This Court should grant the petition for certiorari. Alternatively, this Court should summarily reverse the decision of the Wisconsin Court of Appeals, District IV, and reinstate the judgment of the trial court.

Respectfully submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

RESPONDENT'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

RESPONDENT'S REPLY TO BRIEF OF UNITED STATES AS AMICUS CURIAE

First, respondent Irene Blumer agrees with the ultimate conclusion of the Solicitor General that this Court should deny certiorari. While the respondent disagrees with the Solicitor General's analysis of the merits of the case, it is clear that this issue requires more development before it is appropriate for this Court to consider it. It is also clear that the required development will be occurring expeditiously. The Secretary of the Department of Health and Human Services (DHHS) has apparently committed to promulgating clarifying regulations (see Solicitor General's brief at 9, 14-15). Despite the respondent's assertions to the contrary (Resp. reply at 2-3) DHHS is capable of promulgating rules relating to the Medicaid program quickly when it is

necessary and appropriate to do so.[1] Before this Court considers reviewing this issue it should have the benefit of the formal opinion of the Secretary.

Second, as the Solicitor General points out, the regulations will give the Wisconsin Court of Appeals and /or the Wisconsin Supreme Court an opportunity to revisit the issue. Resolution by either of those courts in light of federal regulatory authority could obviate the need for review by this Court altogether.

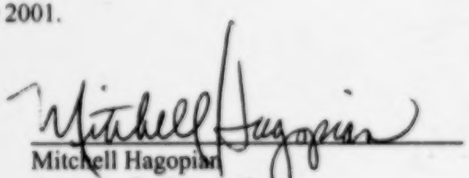
Finally, the respondent in its reply has now requested, without reference to authority, that this Court summarily reverse the decision of the Wisconsin Court of Appeals (see Resp. reply at 4). Summary reversal would be most inappropriate in this case. Nothing in the brief of the amicus curiae suggests that Wisconsin Court of Appeals decision should be summarily reversed. With all due respect to the confusing informal policy views of DHHS and the lower courts that have come to a different conclusion than that reached in this case, there remains the possibility that the Wisconsin Court of Appeals actually got it right—the statute unambiguously requires application of the resource-first methodology. No matter what the ultimate conclusion on this "inordinately complex statutory scheme" (Solicitor General's brief at 15) it is a matter that would require extensive briefing and argument before decision. It is <u>not</u> appropriate for summary reversal.

[1] For example, DHSS recently promulgated a regulation similar in complexity to the one likely to be promulgated here entitled "Medicaid Program; Change in Application of Federal Financial Participation Limits." That regulation was proposed on October 31, 2000 and finalized on January 11, 2001—a span of less than eighty <u>days</u>. See Proposed Rule, 65 Fed. Reg. 64919-64924 (10/31/00); Final Rule, 66 Fed. Reg. 2316 (1/11/01).

CONCLUSION

In accordance with the view of the Solicitor General of the United States, this Court should deny the petition for certiorari.

Dated this 12th day of June 2001.



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v.

IRENE BLUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Through the Medicaid program, 42 U.S.C. 1396 *et seq.*, the federal government provides partial funding to the States for the provision of medical services to eligible needy persons. This case arises out of the Medicaid program's "spousal impoverishment" provisions, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998), which establish special rules for determining the eligibility of a married individual who is institutionalized (in a nursing home or otherwise), but has a spouse (the "community spouse") who is not. In particular, those provisions govern the allocation of income and resources between such spouses for purposes of determining Medicaid eligibility. The question presented is:

Whether, in a "fair hearing" proceeding to consider whether to raise the community spouse's resource allowance pursuant to 42 U.S.C. 1396r-5(e), Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d) (West 1997), which treats income otherwise attributable to the institutionalized spouse as available to the community spouse to meet that spouse's minimum monthly maintenance needs, is consistent with the federal statute, 42 U.S.C. 1396r-5(e)(2)(C).

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In the Supreme Court of the United States

No. 00-952

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER

v.

IRENE BLUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Medicaid program, established by Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343 (42 U.S.C. 1396 *et seq.*) "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). States that participate in ~~the~~ Medicaid program agree to provide coverage and benefits in conformity with federal guidelines. *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). "Each participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance.'" *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981) (quoting 42 U.S.C. 1396a(a)(17)). The state standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the

Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17).

Income and resource calculations for married persons have proved to be a matter of great complexity, particularly when one of the spouses (referred to as the "institutionalized spouse") is cared for in an institutional setting, such as a nursing home, but the other spouse (referred to as the "community spouse") is not. Until 1989, the rules governing the Medicaid eligibility of institutionalized individuals did not offer much protection for the needs of their community spouses. Instead, Medicaid eligibility was calculated as if most or all of the couple's income and resources could be dedicated exclusively to the cost of caring for the institutionalized spouse. With respect to income, Medicaid regulations initially permitted some income to be protected for the needs of a community spouse and dependents, but the amount of income that could be so protected was very small. See 42 C.F.R. 435.700 *et seq.* (1980). As a result, the spouse in the community was sometimes left with income below the poverty level. See H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 258 (1988). With respect to resources, a similar rule prevailed. The couple's joint assets (subject to a quite limited exclusion) and any property owned solely by the institutionalized spouse were considered available for the care of the institutionalized spouse. Almost all of a married couple's assets therefore had to be depleted before the institutionalized spouse would qualify for Medicaid. The net effect of those requirements in some cases was the "pauperization" of the community spouse. H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2, at 65 (1987).

Congress attempted to alleviate that "spousal impoverishment" hardship in the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998). In particular, Congress "attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for

that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits by ensuring that income was not completely transferred to the community spouse." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 798 (6th Cir.), cert. denied, 525 U.S. 964 (1998). That balance is achieved through a complex set of requirements and exclusions that a State must employ when allocating income and resources between community and institutionalized spouses, both when the initial eligibility determination is made, and later in post-eligibility determinations. The spousal impoverishment provisions "supersede any other provision" of the Medicaid statute "which is inconsistent with them." 42 U.S.C. 1396r-5(a)(1).

With respect to the allocation of income, the spousal impoverishment provisions impose only a single rule applicable to initial eligibility determinations. "During any month in which an institutionalized spouse is in the institution," the statute provides, "no income of the community spouse shall be deemed available to the institutionalized spouse" (subject to certain exceptions). 42 U.S.C. 1396r-5(b)(1). Thus, subsection (b)(1) establishes a special rule that protects the income of the community spouse by excluding that income from consideration when determining whether the institutionalized spouse is eligible for Medicaid. That prohibition represents a departure from prior practice, under which many state Medicaid plans, consistent with the Secretary's regulations, treated the assets and income of *either* spouse as available to the other. Subsection (b)(1), however, does not address the extent to which the institutionalized spouse's income may be considered available to meet the needs of the community spouse.

With respect to income attribution after the initial eligibility determination is made, the spousal impoverishment provisions provide more extensive guidance and requirements. For example, subsection (b)(2) provides that, if payment of

income is made solely in the name of one spouse, that income is generally treated as available *only* to that spouse. See 42 U.S.C. 1396r-5(b)(2). Subsection (d) provides a number of exceptions to that rule, which are generally designed to ensure that the community spouse has sufficient income to meet his or her basic monthly needs. In particular, it provides for the establishment of "minimum monthly maintenance needs allowance" or "MMMNA" for each community spouse. 42 U.S.C. 1396r-5(d). The community spouse's minimum monthly maintenance needs allowance is set at a level that is much higher than the official federal poverty level.[1] Once income is allocated between the spouses according to the general rules in subsection (b), the income allocated to the community spouse is compared to the community spouse's minimum monthly maintenance needs allowance. If the community spouse's income is less than the minimum monthly maintenance needs allowance, the amount of the shortfall is deducted from the income of the institutionalized spouse that would otherwise be considered available for the care of the institutionalized spouse. 42 U.S.C. 1396r-5(d)(2). The amount of that deduction is referred to as the "community spouse monthly income allowance." *Ibid.*

The deduction of the community spouse monthly income allowance, in effect, prevents money the community spouse requires to meet basic needs from being considered available for the care of the institutionalized spouse. The deduction in some cases permits individuals to remain Medicaid eligible and in others permits Medicaid to defray a greater portion of the costs of institutionalized care than it otherwise would; the greater Medicaid payments for care of the institutionalized spouse free up income to meet the minimum needs of

[1] The minimum monthly maintenance needs allowance for the community spouse is set at 150% of the poverty line for a couple, plus an "excess shelter allowance" reflecting certain expenses to the extent that those expenses consume more than 30% of that figure. 42 U.S.C. 1396r-5(d)(3) and (4).

the community spouse. The community spouse monthly income allowance thus ensures that the community spouse's basic monthly maintenance needs can be met *before* income is considered available for the care of the institutionalized spouse.

With respect to the attribution of resources (*i.e.*, assets) between spouses, the statute provides extensive rules for both initial and post-eligibility decisions. For initial eligibility determinations, each spouse's share of resources is calculated as of the beginning of the period of institutionalization. At that time, all of the couple's resources are tallied together, and one half of the total value is allocated to each spouse. Often, most of the resources allocated to the institutionalized spouse must be exhausted before the institutionalized spouse is eligible for Medicaid. In contrast, the community spouse's share is protected from complete exhaustion. In particular, the community spouse's resources are not considered available for the care of the institutionalized spouse—and the institutionalized spouse, once Medicaid eligible, remains eligible—so long as the community spouse's share does not exceed the "community spouse resource allowance" or "CSRA." The CSRA thus limits the extent to which the community spouse must exhaust resources before the institutionalized spouse becomes eligible for Medicaid. The CSRA is the greatest of (i) $12,000 or a State standard up to $60,000 (indexed for inflation); (ii) the lesser of the spouse's resource share (approximately one-half of the spouses' pooled resources) or $60,000 (indexed for inflation); (iii) the amount set at a "fair hearing" under 42 U.S.C. 1396r-5(e)(2); or (iv) the amount transferred pursuant to a court order. 42 U.S.C. 1396r-5(f)(2)(A).

This case concerns the provisions of the Medicaid statute which permit the CSRA to be increased, through the "fair hearing" procedure, when the community spouse's income is less than that spouse's minimum monthly maintenance needs allowance. Permitting the community spouse to obtain a

larger CSRA can give the community spouse additional income-generating resources to meet minimum monthly needs; absent an increase in the CSRA, the resources would be considered available to the institutionalized spouse and might have to be exhausted before the institutionalized spouse would be Medicaid eligible. The key provision is Section 1396r-5(e)(2)(C), entitled "Revision of community spouse resource allowance." It provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance * * * , an amount adequate to provide such a minimum monthly maintenance needs allowance.

The question in this case concerns what sources of income may be considered when determining whether to adjust, or the extent of any adjustment to, the CSRA under that provision.

2. After enactment of the 1988 spousal impoverishment provisions, a divergence in practice arose among the States with respect to the adjustment of the CSRA under subsection (e)(2)(C). Under the so-called "income-first" method, income of an institutionalized spouse is allocated to the community spouse for purposes of determining the extent to which the community spouse has sufficient income to meet minimum monthly maintenance needs. Under that method, the CSRA is not increased unless the community spouse's income will not reach his or her minimum monthly maintenance needs allowance *after* taking into account any income available from the institutionalized spouse. In contrast, under the "resource-first" approach, the couple's resources can be protected for the benefit of the community spouse to the extent necessary to ensure that the community

spouse's total income, including income generated by the CSRA, meets the community spouse's minimum monthly maintenance needs allowance; the fact that additional income from the institutionalized spouse may be or could be made available for the community spouse is not considered.

The Department of Health and Human Services (HHS) has stated in policy memoranda and letters that 42 U.S.C. 1396r-5(e)(2)(C) authorizes consideration of potential income transfers from the institutionalized spouse to the community spouse, so that States may adopt the income-first method or apply some other reasonable interpretation of the law until HHS issues final regulations addressing the issue. Pet. App. 78a-90a. Cf. *Cleary* v. *Waldman*, 167 F.3d 801, 806-807 (3d Cir.) (upholding income-first methodology), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, *supra* (same). By statute, the State of Wisconsin has adopted the income-first method, consistent with HHS's interim policy guidance. Wis. Stat. Ann. § 49.455(8)(d) (West 1997); Pet. App. 76a.

3. Two years after respondent Irene Blumer was admitted to a nursing facility in 1994, she applied for Medicaid through her husband, Burnett Blumer. The Green County Department of Human Resources concluded that, as of respondent's institutionalization in 1994, the couple had $145,644 in assets; accordingly, it calculated a community spouse resource allowance for Mr. Blumer of $72,822, which was half the couple's total assets. Respondent, as the institutionalized spouse, was permitted to retain only $2000 in assets. The County determined that, as of the date of respondent's 1996 application, the couple's assets totaled $89,335. That was approximately $14,500 above the eligibility threshold of $74,822 ($72,822 for Burnett Blumer under his CSRA, and $2000 for respondent). Pet. App. 24a-25a; see also *id.* at 2a.

Respondent sought a fair hearing from the Division of Hearings and Appeals of the Wisconsin Department of

Health and Family Services pursuant to 42 U.S.C. 1396r-5(e)(2)(C). The hearing examiner concluded that, if income of the institutionalized spouse (respondent) were excluded from consideration, Mr. Blumer's total monthly income would be $1702.45, approximately $25 below the minimum monthly maintenance needs allowance of $1727. Pet. App. 25a, 30a; see also *id.* at 2a-3a. Accordingly, respondent argued that, under 42 U.S.C. 1396r-5(e)(2)(C), the CSRA should be raised to generate the $25 per month in additional income for Mr. Blumer. Increasing the CSRA would permit the couple to retain additional assets without rendering respondent ineligible for Medicaid. Pet. App. 3a.

Consistent with Wisconsin law and HHS's interim guidance, however, the hearing examiner determined whether there was other income available to support Mr. Blumer and thus to meet his minimum monthly maintenance needs. He concluded that respondent had income of $1262.71, and that the couple's combined income therefore exceeded $2900. Pet. App. 30a-31a. Using the income-first method required by Wisconsin law, the hearing officer found that Mr. Blumer's income could be raised to the minimum monthly needs level by allocating $25 per month to him from his institutionalized spouse, respondent. *Id.* at 31a; see also *id.* at 3a. Accordingly, the hearing examiner declined to increase the CSRA. *Id.* at 31a-32a. The effect of the decision was to defer respondent's eligibility for Medicaid until the $14,500 in excess resources were exhausted (on respondent's care, on meeting Mr. Blumer's needs, or otherwise).

Respondent appealed, and the Green County Circuit Court affirmed the decision of the State agency, rejecting respondent's contention that Wisconsin's income-first method conflicted with the federal statute. Pet. App. 19a-22a.

4. The Wisconsin Court of Appeals reversed. Pet. App. 1a-17a. In its view, Section 1396r-5(e)(2)(C) unambiguously mandates the resource-first method, *i.e.*, that the community spouse's resource allowance must be adjusted upward to

generate sufficient income to meet the minimum monthly maintenance needs allowance, without considering whether or to what extent income is available or could be allocated from the institutionalized spouse. *Id.* at 11a. The court found support for its reading of the statute in the provisions indicating that the CSRA adjustment occurs as a pre-eligibility determination, *id.* at 12a-14a, and from the overall policy of the spousal impoverishment provisions, *id.* at 14a-16a. The Wisconsin Supreme Court denied the State's petition for discretionary review. *Id.* at 18a.

DISCUSSION

In the decision below, the Wisconsin Court of Appeals invalidated a Wisconsin state statute, holding that the spousal impoverishment provisions of the Medicaid program unambiguously preclude the use of an "income-first" methodology. We agree with the State that the decision of that intermediate state appellate court is incorrect; that it conflicts with the decisions of two federal courts of appeals and the decisions of the highest courts of two other States, all of which have upheld methodologies like the one chosen by Wisconsin; and that the case concerns a matter of substantial importance.

Nonetheless, we do not believe that review of the issue by this Court is warranted at this time. The United States Department of Health and Human Services has informed us that, in light of the Wisconsin Court of Appeals' invalidation of the income-first rule on a state-wide basis, it plans promptly to promulgate regulations addressing the question presented here. See also Uniform Agenda, 65 Fed. Reg. 73,838, 73,839 (Nov. 30, 2000). Given the traditional deference this Court accords to agency regulations implementing a statutory scheme entrusted to the agency for administration, HHS's regulations will be of substantial assistance in the interpretation of this complex statutory scheme. Indeed, because Congress has expressly delegated standards-pre-

scribing authority—*i.e.*, it has delegated not merely interpretive but legislative rulemaking authority—to the Secretary in this area, the Secretary's regulations may prove to be central to the full consideration and dispositive resolution of the issue. Finally, the new regulations could altogether eliminate any need for review by this Court: If those regulations continue to authorize the income-first approach, the State may ask the Wisconsin Court of Appeals to revisit the issue; if that court declines to do so, the Wisconsin Supreme Court may choose to review the issue at that time, and then bring the law of that State in line with the Secretary's regulations and the decisions of the other appellate courts that have considered the matter. In analogous circumstances in the past, the Court has deferred review pending the issuance of agency regulations. See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 421 (1977). We urge the Court to take the same course here.

1. This case concerns the legality of Wisconsin's methodology for determining Medicaid eligibility under that program's spousal impoverishment provisions, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998). Under Section 1396r-5(e), States must increase a community spouse's resource allowance (CSRA) if such an adjustment is necessary to ensure that the community spouse's total monthly income meets the minimum monthly maintenance allowance. Adjusting the CSRA, in effect, increases the total amount of resources the couple can retain without rendering the institutionalized spouse ineligible for Medicaid; the additional income generated by those extra resources can then be used to meet the community spouse's monthly needs. Like many other States, Wisconsin has decided that, when determining whether the income available to the community spouse falls short of the minimum monthly maintenance needs allowance, the community spouse's income should include any excess income from the institutionalized spouse that could be made available to the community spouse. Two federal courts of

appeals have upheld that methodology, which is known as "income first," as permissible,[2] as have the highest courts of two other States.[3] Disagreeing with those decisions, Pet. App. 10a, the Wisconsin Court of Appeals in this case held that the income-first methodology is foreclosed by the statute. *Id.* at 11a-12a.

In so holding, the Wisconsin Court of Appeals created a conflict on a matter of substantial importance. From the State's perspective, the fiscal impact is potentially large. Respondents do not dispute that the cost to the State of Wisconsin is more than $2 million per year (Br. in Opp. 3), and Wisconsin estimates that the annual cost is approximately $10 million per year (Pet. 20); because the federal government reimburses certain Medicaid expenses, much of that cost will be borne by the national government. Moreover, consistent with the Secretary's informal guidance, a majority of States currently use the income-first method the Wisconsin Court of Appeals invalidated.[4] Finally, for individual Medicaid claimants and their families, the method under which income (and thus Medicaid eligibility) is determined can have a profound impact on their financial decisions.

The decision of the court of appeals, holding that the statute unambiguously forbids the use of the income-first methodology, is also incorrect. The court of appeals rested

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[2] *Cleary* v. *Waldman*, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998).

[3] *Golf* v. *New York State Dep't of Soc. Servs.*, 697 N.E.2d 555 (N.Y. 1998); *Thomas* v. *Commissioner of the Div. of Med. Assistance*, 682 N.E.2d 874 (Mass. 1997).

[4] We have been informed by the Health Care Financing Administration that its own informal survey suggests that some States that currently use the income-first methodology were omitted from the list provided at Pet. 9 n.8, and that some States listed may not use that methodology. In all events, however, a majority of States currently use the income-first method.

its decision on the fact that Section 1396r-5(e)(2)(C) "very specifically directs the increase" of the community spouse's resource allowance "to an amount sufficient to generate additional income to meet" the community spouse's minimum monthly maintenance needs allowance. Pet. App. 11a. It is true that subsection (e)(2)(C) directs the agency to determine whether the community spouse's income meets his or her minimum monthly maintenance needs. And that provision also declares that, if the community spouse's income falls short of meeting those needs, the CSRA should be increased by an amount that will generate sufficient income to bring the community spouse's income to the minimum monthly maintenance needs level. But those evident features of the subsection do not resolve what may be considered income of the community spouse in the first place, when deciding whether or not the community spouse has sufficient income to meet his or her minimum monthly maintenance needs. As one court has explained, the view adopted by the Wisconsin Court of Appeals fails to confront the question whether "a community spouse's 'income' includes—or does not include—any transfer of income from the institutionalized spouse." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998). "Whether this transferred income is included distinguishes the two possible approaches used to implement subsection (e)(2)(C)." *Ibid.*

On *that* issue—what constitutes income available to the community spouse for purposes of initial eligibility determinations—the spousal impoverishment provisions are silent. Indeed, while those provisions very specifically prohibit the *community spouse's income* from being "deemed" available for the care of the *institutionalized spouse*, 42 U.S.C. 1395r-5(b)(1), they nowhere preclude the Secretary or the States from considering the *institutionalized spouse's income* from being considered available to the *community spouse*. In light of that omission, the most

natural inference is not that Congress intended to prohibit the community spouse's income from including excess income of the institutionalized spouse; instead, it is that Congress intended to allow that practice, or at least left the propriety of that practice to be determined "in accordance with standards prescribed by the Secretary," 42 U.S.C. 1396a(a)(17). *Cf. Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Nor was the Wisconsin Court of Appeals correct to rely on the statute's provisions concerning certain resource and income allocation procedures at particular stages of the administrative process. That court held that, because the CSRA is calculated before eligibility is determined (it is a "pre-eligibility" determination), income from the institutionalized spouse should not be treated as income of the community spouse at that stage. In that regard, the court noted that the statute addresses the question of allocation of the institutionalized spouse's income to the community spouse in connection with the State's determination—post-eligibility —of how much of the institutionalized spouse's income can be applied to the monthly cost of care, see 42 U.S.C. 1396r-5(d)(2), and the court inferred from that provision that any similar allocation at the pre-eligibility stage is prohibited. Pet. App. 12a-14a. That inference is hardly ineluctable. It is just as plausible to read the pre- and post-eligibility methodologies in harmony with each other, such that the institutionalized spouse's excess income may be treated as income available to the community spouse pre-eligibility to the extent permitted under standards promulgated by the Secretary, in the same manner that such income must be allocated to the community spouse post-eligibility as provided in Section 1396r-5(d)(2). In other words, the fact that the statute expressly provides for an income allowance from the institutionalized spouse post-eligibility does not bar the Secretary from permitting a parallel allowance to be considered in calculating the community spouse's income

pre-eligibility. As one court of appeals explained, the "distinction between the resource allowance and the income allowance does not * * * address—or limit—the issue of whether a transfer of income may be considered when a community spouse resource allowance adjustment is contemplated under § 1396r-5(e)(2)(C)." *Chambers*, 145 F.3d at 802.

Finally, the Wisconsin Court of Appeals' decision is inconsistent with the legislative history of the 1988 amendments. Addressing the very provision at issue here, the Conference Report declared:

> If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 265 (1988) (emphasis added). Thus, in contradiction with the inference drawn by the Wisconsin Court of Appeals, the Conference Report demonstrates that Congress understood that there might be "other income attributable to the community spouse" that can be considered when determining whether to raise the CSRA.

2. Notwithstanding the foregoing, the Court should not grant the petition for a writ of certiorari. At the time the court of appeals decided this case, the Department of Health and Human Services had issued—and the States were operating under—the Secretary's interim guidance. Under that guidance, States had "the option to use the 'income first' rule or to apply some other reasonable interpretation of the law *until* [the Health Care Financing Administration (HCFA)] issue[s] final regulations which specifically address this issue." Pet. App. 86a (emphasis added). We have been

informed that, in light of the state court of appeals' construction of the statute, and its invalidation of the income-first rule on a state-wide basis, HCFA has determined to issue regulations addressing the issue presented by this case on an expedited schedule. In particular, HCFA intends to issue a notice of proposed rulemaking within 90 days.

Those new regulations could significantly affect not only the nature of the question before the Court—and inform this Court's resolution of that question—but also whether the Court's resolution of that issue is necessary at all. Because the statute is technical and complex, the agency's views, as embodied in final regulations, are of considerable importance here. *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). Indeed, this case concerns the Social Security Act, notorious for being "almost unintelligible to the uninitiated." *Friedman* v. *Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (Friendly, J.), cert. denied, 430 U.S. 984 (1977). Even when compared to the rest of the Social Security Act, the spousal impoverishment provisions of the Medicaid program are particularly intricate; the officials who must oversee their implementation on a daily basis consider them to be "extremely complicated" and, "in places[,] ambiguous and incomplete." Pet. App. 84a. The Court should not undertake the difficult task of interpreting this inordinately complex statutory scheme without the benefit of the Secretary's final views.

In this context, moreover, the Secretary's regulations could prove not merely helpful or important, but rather central to determining the validity of state implementing legislation. The Social Security Act at various points accords the Secretary quasi-legislative standards-setting authority on income-attribution issues. Section 1396a(a)(17), for example, provides that state plans must "provide for taking into account only such income and resources as are, *as determined in accordance with standards prescribed by the*

Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B) (emphasis added). This Court has recognized that Congress, by using such language, "expressly *delegate[s]* to the Secretary the power to prescribe standards" for purposes of determining eligibility, and thus to adopt "regulations with legislative effect." *Batterton* v. *Francis*, 432 U.S. at 425. "In a situation of this kind, Congress entrusts * * * the primary responsibility for" providing content to the statute "to the Secretary, rather than to the courts," *ibid.*, and the regulations are "entitled to more than mere deference or weight," *id.* at 426.[5] See also *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981) (Secretary's regulations under Section 1396a(a)(17) are entitled to "legislative effect"); *Chevron*, 467 U.S. at 843-844 (explaining that, where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision" and the resulting "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute," but that, where the delegation is merely implicit, the agency's construction controls if it is "reasonable").

In addition, although HHS's interim guidance allows the States the option of using income-first or other reasonable methodologies, the Secretary's final regulations could differ from the interim guidance. They could require the use of income first. But they also could mandate resource first, or continue the Secretary's policy of giving the States a choice among reasonable options. See *Batterton* v. *Francis*, 432 U.S. at 421-422, 429-432 (holding that, where the statute

[5] *Batterton* v. *Francis* concerned a (now repealed) provision of the Social Security Act, 42 U.S.C. 607(a) (1994), with nearly identical language. Section 607(a) provided benefits for dependent children who (among other things) have "been deprived of parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of [their] father." See 432 U.S. at 418 n.2, 419 (emphasis added).

permits the Secretary to "prescribe standards," the Secretary may accord States a reasonable range of options). Until the Secretary issues the final regulations, inquiry into whether any particular implementation of the spousal impoverishment provisions is consistent with statutory text would seem premature and potentially advisory.

Finally, the Secretary's issuance of new regulations could render this Court's review unnecessary. It is possible that the Wisconsin Court of Appeals will, even after the Secretary's issuance of regulations, decline to reconsider its decision. That court, after all, rejected the State's plea for deference to the Secretary's interim policy in part on the ground that Wisconsin courts "do not look to other sources to interpret a statute if its language is clear on its face." Pet. App. 16a.[6] The Wisconsin Court of Appeals, however, is not

[6] The Secretary's regulations, of course, cannot create ambiguity where there is none. Nonetheless, the Wisconsin Court of Appeals also declined deference on the ground that HHS "has not interpreted the statute consistently." Pet. App. 16a. Presumably, the Wisconsin Court of Appeals was alluding to *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), which indicates that the weight federal courts give to a statutory interpretation issued by the administering agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Cf. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The Wisconsin Court of Appeals' claim of inconsistency, however, is without merit. The agency's initial policy statement regarding 42 U.S.C. 1396r-5(e)(2)(C), issued in November 1993, indicated that it was "requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. 1396r-5(d)(1)(B)] before being allowed to raise the [CSRA]." Pet. App. 81a. Later, on March 3, 1994, HCFA's Director issued a memorandum, stating that the November 1993 memorandum should not be read as *requiring* the income-first method. *Id.* at 85a, 88a. Rather, the agency sought to give the States "the option to use the 'income first' rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue." *Id.* at 86a. Thus, HHS has never departed from its view that Congress intended that the States should be permitted to use an income-

that State's highest court; the Wisconsin Supreme Court is. That court may well choose to review this issue if, following the Secretary's issuance of regulations, the state court of appeals adheres to its current position; the policies governing that court's exercise of its power of discretionary review strongly suggest such a result.[7] In any event, if the Wisconsin state courts do not bring the law of that State into conformity with the decisions of the federal courts of appeals and the highest courts of other States—or if the Wisconsin courts invalidate the Secretary's regulations—this Court will have ample opportunity to resolve the resulting conflict, and to do so with the benefit of the Secretary's regulations.

The Court followed a similar course in *Batterton* v. *Francis*, *supra*. In that case, the Court initially declined to review, on the merits, a decision of a three-judge panel that

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first method. Rather, the agency has merely indicated that, in view of the ambiguity in the statute, the federal government would pay the resulting federal share of Medicaid benefits to States using either the resource-first method or the income-first method, without challenging those States' practices, in the absence of agency regulations. Cf. *Lincoln* v. *Vigil*, 508 U.S. 182 (1993); *Heckler* v. *Chaney*, 470 U.S. 821 (1985). Besides, even inconsistency is no basis for stripping the agency's view of its "power to persuade." *Skidmore*, 323 U.S. at 140. Unduly weakened deference creates a risk of chaotic, inconsistent rulings in programs governing federal health, safety, and welfare programs that could overtax this Court's supervisory capacity. See, Peter L. Strauss, *One Hundred Fifty Cases Per Year*, 87 Colum. L. Rev. 1093 (1987). This consideration becomes especially important with respect to federal statutes that are administered by the States. *Skidmore* and *Christensen* require more respectful analysis of the agency's views than the peremptory treatment accorded by the Wisconsin Court of Appeals.

[7] Under those policies, the Wisconsin Supreme Court will review cases presenting substantial and novel legal issues, particularly where there is a conflict among courts of appeals or, where the decision is consistent with earlier precedent, "changing circumstances" make the opinions "ripe for reexamination." See App., *infra*, 2a. The Secretary's issuance of comprehensive final regulations construing the federal statute, if they are inconsistent with the state appellate court's view of that statute's meaning, should qualify as a change in circumstances warranting re-examination of the court of appeals' holding.

had invalidated a state Social Security regulation as inconsistent with federal regulations. "Although [the federal agency] did not agree" that the state policy was inconsistent with its regulations, "the Solicitor General, in his memorandum for the United States as *amicus curiae*, filed * * * at this Court's invitation, 408 U.S. 920 (1972), suggested a summary affirmance * * * in light of the then-forthcoming revision of the [agency] regulation," 432 U.S. at 421, and this Court in fact summarily affirmed that decision, *Davidson* v. *Francis*, 409 U.S. 904 (1972). Later, after the district court declined to reconsider its decision in light of the new regulations and was affirmed by the court of appeals, this Court granted certiorari and resolved the dispute, which by then was substantially altered. Indeed, it seems fair to say that, under the Court's analysis, see 432 U.S. at 426-427, the Secretary's regulations proved central to the resulting decision. Similar considerations here counsel a similar course —*i.e.*, deferring review of the issue pending the Secretary's issuance of final regulations.[8]

We recognize, of course, that deferring review of this issue even temporarily imposes a financial burden on the State of Wisconsin and on the federal government, which reimburses the States for a portion of their costs. In

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[8] The analogy to *Batterton* v. *Francis*, of course, is not perfect. In this case, the Wisconsin Court of Appeals held that the Medicaid *statute* unambiguously precludes the use of an income-first methodology; the decision this Court summarily affirmed in *Francis* held that a federal *regulation* precluded the state policy at issue. Nonetheless, the Secretary's forthcoming regulations are likely to prove as important to the Court's resolution of the issue here as they did in *Francis*. First, to the extent Congress delegates standards-setting authority to the Secretary, as under 42 U.S.C. 1396a(a)(17), the Secretary's regulations setting forth those standards are critical if not indispensable to the meaningful judicial review of state statutes. Second, because the Wisconsin Supreme Court has not reviewed this issue on the merits, the Secretary's new regulations, if they continue to authorize the income-first rule, may persuade that court to review the matter and uphold the state statute; such a decision, by eliminating the conflict, might make review by this Court unnecessary.

addition, pending the Secretary's issuance of regulations and the completion of further judicial review, some beneficiaries in the State of Wisconsin will receive benefits under a court-mandated resource-first rule, while similarly situated individuals in other States are denied benefits under the income-first methodology. The Secretary's interim policy guidance, however, expressly contemplates the possibility that States will use different methodologies—it permits the use of income-first or any other reasonable methodology—pending the Secretary's issuance of final regulations. Moreover, in view of Congress's delegation of standards-setting authority to the Secretary in portions of the Social Security Act, this Court has upheld regulations that authorize States to choose among reasonable methodological options. See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. at 430 (holding that the power to "determine" particular issues "remains with the States," and that "the power to prescribe 'standards' gives the Secretary sufficient flexibility to recognize some local options in determining * * * eligibility"). In any event, because the Secretary's regulations may greatly influence the nature of the question eventually presented to this Court and prove important in its resolution, we believe that the better course is to decline consideration of this issue, for now, pending the Secretary's issuance of regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2001

APPENDIX

WEST'S WISCONSIN STATUTES ANNOTATED

CIVIL PROCEDURE

CHAPTER 808. APPEALS AND WRITS OF ERROR

808.10. Review by the supreme court

A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

* * * * *

The [Wisconsin] Supreme Court Order of Nov. 15, 1978 provides:

"This court, having deemed it appropriate for the guidance of the Bar and the general public to set forth the standards it will apply in reviewing petitions to appeal from an adverse decision of the Court of Appeals filed pursuant to sec. 808.10 and Rule 809.62, Stats., and this court noting that granting such petitions is a matter within its sound judicial discretion, hereby adopts the following guidelines, which are neither controlling nor limiting measures of such discretion:

"This court will grant a petition to appeal whenever three or more justices of this court vote to grant such petition and when any one of the following criteria are met:

"A) A real and significant question of federal or state constitutional law is presented.

"B) The petition demonstrates a need for this court to consider establishing, implementing or changing a policy within this court's authority.

"C) A decision by this court will help develop, clarify or harmonize the law and

"1) The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

"2) The question presented is a novel one, the resolution of which will have state-wide impact; or

"3) The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this court.

"D) The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or this court or other Court of Appeals' decisions.

"E) The Court of Appeals' decision is in accord with opinions of this court or the Court of Appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

"The above stated guidelines are set forth to indicate what this court considers in reviewing petitions to appeal. It must be emphasized, however, that the presence in a case of any one or any combination of these factors is not an assurance that the petition to appeal will be granted. Nor is the apparent absence of such factors an assurance that the petition will be denied."

(12)

Supreme Court, U.S.
FILED
SEP
OFFICE OF THE CLERK

No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

JOINT APPENDIX

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Certiorari Granted June 25, 2001

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Item	Page
Decision of Wisconsin Court of Appeals, District IV, No. 99-1053 (filed 6/8/00), Reported in *Irene Blumer v. Wisconsin Department of Health and Family Services*, 237 Wis. 2d 810, 615 N.W.2d 647 (2000)	1a
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

8/20/97	Petition for Judicial Review filed, Green County Wisconsin Circuit Court.
9/12/97	Certified Record of Administrative Proceedings filed.
11/11/98	Oral Decision of the Trial Court.
2/15/99	Judgment filed, Green County Circuit Court.
6/8/00	Decision of the Wisconsin Court of Appeals, District IV.
7/10/00	Petition for Review filed, Wisconsin Supreme Court.
9/12/00	Order of the Wisconsin Supreme Court denying review.

SUPREME COURT OF THE UNITED STATES

No. 00-952

Wisconsin Department of Health and Family Services,

Petitioner

v.

Irene Blumer

ORDER ALLOWING CERTIORARI. Filed June 25, 2001.

The petition herein for a writ of certiorari to the Court of Appeals of Wisconsin, District IV is granted.

June 25, 2001

[Caption omitted]

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

June 25, 2001

Supreme Court, U.S.
FILED
SEP 7 2001
OFFICE OF THE CLERK

(5)

No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF FOR PETITIONER

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QUESTION PRESENTED

This case requires interpretation of the spousal impoverishment provisions of the federal Medicaid Act, 42 U.S.C. § 1396r-5 (1994 and Supp. 2000). The spousal impoverishment provisions permit a community spouse living at home to retain certain income and resources to meet his or her own monthly maintenance needs when the spouse in a nursing home becomes eligible for Medicaid. The statute provides for a standard amount of resources that need not be depleted when the institutionalized spouse qualifies for Medicaid. The statute permits an increase in the standard allowance, however, if the community spouse can show that he or she will not have a certain minimum level of income on which to live once the institutionalized spouse qualifies for Medicaid. When determining whether the community spouse is entitled to shelter resources in excess of the standard resource allowance, Wisconsin, like more than thirty other states, first considers whether potential income transfers from the institutionalized spouse expressly permitted by the statute will be sufficient to provide for the community spouse's monthly needs, once Medicaid eligibility occurs. The question presented is:

Whether the "income first" requirement of the Wisconsin Medicaid spousal impoverishment statute, Wis. Stat. § 49.455(8)(d) (1995-96), requiring that potential income transfers from the institutionalized spouse be considered part of "the community spouse's income" for purposes of determining whether a higher resource allowance is warranted, conflicts with 42 U.S.C. § 1396r-5.

LIST OF PARTIES

Actual parties to the proceedings in the Wisconsin Court of Appeals and Wisconsin Supreme Court were:

The Wisconsin Department of Health and Family Services, State of Wisconsin,

Petitioner herein,

Irene Blumer, Petitioner-Appellant in the Wisconsin courts,

Respondent herein.

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A. The "income first" rule is a reasonable interpretation of § 1396r-5, which is silent and does not require either an "income first" or a "resource first" approach. 19

1. The term "community spouse's income" is ambiguous. 19

2. The "income first" rule is a reasonable interpretation of § 1396r-5 and of the fair hearing remedy provided by subsection (e)(2)(C). 25

a. Section 1396r-5 is designed to balance the needs and responsibilities of institutionalized and community spouses. 25

b. The "income first" methodology is consistent with the purpose, function and context of subsection (e)(2)(C). 28

3. Congress understood that states would be able to consider income transfers from the institutionalized spouse to the community spouse during fair hearings under subsection (e)(2)(C). 34

B. The Secretary's longstanding, consistent interpretation permitting states to employ the "income first" rule is persuasive and entitled to judicial deference under *Skidmore*. 37

1. Congress has given the HSS Secretary exceptionally broad authority to interpret the Medicaid Act. 37

2. HSS policy has consistently recognized that states are permitted to use the "income first" methodology. 40

3. HHS' views are entitled to *Skidmore* deference because the "income first" rule is consistent with the competing public policies § 1396r-5 and Title XIX are intended to serve. 43

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No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF FOR PETITIONER

OPINIONS BELOW

The administrative decision of the hearing examiner on behalf of the Wisconsin Department of Health and Family Services ("WDHFS"), *In the Matter of Irene G. Blumer*, MED-23/12842 dated June 10, 1997, is unreported (Pet-Ap. 23a-33a).[1] The judgment of the Green County

[1] "Pet-Ap." identifies the indicated pages from the Appendix to the WDHFS' Petition for Writ of Certiorari. "J.A." refers to the Joint Appendix.

(Wisconsin) Circuit Court, No. 97-CV-0141, dated February 15, 1999, is also unreported (Pet-Ap. 19a-20a). The opinion of the Wisconsin Court of Appeals, District IV, is reported at 237 Wis. 2d 810, 615 N.W.2d 647 (Pet-Ap. 1a-17a). The order of the Wisconsin Supreme Court denying discretionary review is unreported (Pet-Ap. 18a).

JURISDICTION

The decision of the Wisconsin Court of Appeals was filed on June 8, 2000. Petitioner filed a timely petition for discretionary review in the Wisconsin Supreme Court which was denied by an order filed September 12, 2000 (Pet-Ap. 18a). The petition for writ of certiorari was filed December 11, 2000, and was granted on June 25, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY PROVISIONS INVOLVED

Because of their length, the spousal impoverishment provisions of the federal Medical Assistance statute ("Medicaid" or "MA"), 42 U.S.C. § 1396r-5, created by § 303 of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, § 303, 102 Stat. 683, and of Wis. Stat. § 49.455 (1995-96) are set forth at Pet-Ap. 34a-77a.

The particular provision of the MCCA on which the court below relied when it concluded that the Wisconsin statute conflicts with the federal statute, 42 U.S.C. § 1396r-5(e)(2)(C), provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The "income first" provision of the Wisconsin Statutes contained in Wis. Stat. § 49.455(8)(d) (1995-96),[2] states in pertinent part:

> (8) FAIR HEARING. . . .
>
> . . . .
>
> (d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3. that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, *the department may not establish an amount to be*

[2]Wisconsin Stat. § 49.455(8)(d) has not changed significantly since 1996. *See* Wis. Stat. § 49.455(8)(d) (1999-2000). However, the 1995-96 version of the statute is the one involved here.

used under sub. (6)(b)3. unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)
. . . .

STATEMENT OF THE CASE

A. Statutory background.

Medicaid is a joint state and federal program designed to provide necessary medical care for persons unable to afford such care. *See* 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). Generally, only those individuals with income and resources below prescribed levels are eligible for Medicaid. Where an individual's monthly income exceeds the prescribed level, the individual must, to be eligible for Medicaid, incur medical expenses sufficient to reduce his or her income to the prescribed level, a process known as "spending down." Excess resources must also be spent down[3] to the prescribed level.

The spousal impoverishment provisions of the federal Medicaid statute, 42 U.S.C. § 1396r-5 establish special rules for determining the Medicaid eligibility of married persons who are institutionalized, typically in a nursing home (the institutionalized spouse), and who have a spouse in the community (the community spouse).

Before 1988, individuals who qualified for Medicaid, either as "medically needy" or under an optional program, were required to apply much of their personal income to the

[3]In the context of Medicaid eligibility, "spending down" is technically limited to spending income on medical expenses. This brief occasionally uses the term in a non-technical sense to refer to the liquidation and spending of resources for the needs, medical or otherwise, of either spouse or for other valuable consideration.

cost of their nursing home care. Only limited amounts (which varied greatly from state to state) could be made available to a spouse living in the community. *See* H.R. Rep. No. 100-105, pt. 2 ("H. Rep."), at 66-68 (1987), *reprinted in* 1988 U.S.C.C.A.N. 803, 889-91.[4] In addition, except for a very low resource limit, resources owned either individually by the institutionalized spouse or jointly by both spouses were considered available solely for the costs of the care of the institutionalized spouse. *Id.* These income and resource limits had the effect of severely impoverishing the community spouse in many cases. *See Schachner v. Perales*, 648 N.E.2d 1321, 1322 (N.Y. 1995).

At the same time, pre-1988 law contained loopholes that allowed an institutionalized spouse to appear impoverished by sheltering the couple's resources solely in the community spouse's name or in trusts. As a result, those resources would be unavailable to the institutionalized spouse, who could then qualify for Medicaid at a higher level of affluence than that contemplated for the program, which was designed to provide assistance to the poor. *See* H. Rep. at 65-67, 1988 U.S.C.C.A.N. at 888-90.

The purpose of the spousal impoverishment provisions of the MCCA was to end the "pauperization [of the community spouse] by assuring that [he or she] has a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H. Rep. at 65, 1988 U.S.C.C.A.N. at 888. The MCCA is the congressional response to the severe, impoverishing limitations under previously existing

[4]Prior to passage of the MCCA, the allowance permitted to the spouse living at home ranged between 0 in Oklahoma to a high of $632 per month in Alaska, with an average allowance in the range of $250 to $350. *See id.* at 68; 1988 U.S.C.C.A.N. at 890. Regardless of the precise amount, however, these monthly allowances for the spouse living at home were generally far below the poverty level.

provisions of the Medicaid Act on the income and resources that a community spouse could retain to remain in the community. *See generally* H.R. Conf. Rep. No. 100-661 ("Conf. Rep."), at 257-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-37. At the same time, Congress sought to end perceived abuses that permitted community spouses in some cases to insulate excessive amounts of the couple's assets from being used to defray the costs of care for the institutionalized spouse. *Cf.* H. Rep. at 66-67, 1988 U.S.C.C.A.N. at 889-90; *Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 805-06 (3d Cir.) ("*Cleary II*"), *cert. denied*, 528 U.S. 870 (1999).

The spousal impoverishment provisions of 42 U.S.C. § 1396r-5 are extraordinarily intricate. The statute contains six main subsections, § 1396r-5(a)-(f). *See id.; see generally* Conf. Rep. at 257-68, 1988 U.S.C.C.A.N. at 1035-46. Subsection 1396r-5(a) provides that institutionalized spouses are entitled to special treatment in determining Medicaid eligibility and that the provisions of the MCCA supersede other provisions of the Medicaid Act which are inconsistent.

The Resource Provisions

Subsections 1396r-5(c) and (f) created new rules for the treatment of marital resources when an institutionalized spouse applies for Medicaid and, subsequently, when the institutionalized spouse seeks to transfer certain resources to the community spouse. Together, these provisions ensure that a certain amount of resources are protected from depletion in qualifying the institutionalized spouse for Medicaid. Under § 1396r-5(c)(1), the total value of the couple's resources[5] at the beginning of the period of

[5]In making this calculation, "resources" does not include the home, an automobile, personal belongings and certain other forms of property. *See* 42 U.S.C. §§ 1396r-5(c)(5) and 1382b (1994 and Supp. 2000).

institutionalization is calculated and a one-half share is attributed to each spouse. Depending on the amount of each spouse's one-half share, the institutionalized spouse may need to spend virtually all of his or her resources in order to become Medicaid eligible. By contrast, the community spouse is permitted to retain a community spouse resource allowance ("CSRA" or "resource allowance"), which usually equals that spouse's entire one-half share.[6] The amount of the resource allowance can be adjusted at a fair hearing or by court order. *See* subsections (e)(2)(C) and (f)(2). The interspousal attribution of resources is made without regard to state marital or community property laws.[7]

The couple's resources are considered available to an institutionalized spouse (and therefore must be spent) only to the extent they exceed the resource allowance as of the time of application for Medicaid. *See* subsection (c)(2)(A) and

[6]Under § 1396r-5(f)(2)(A), the resource allowance does not equal the community spouse's one-half share when that share is below the resource allocation minimum (currently $50,000 adjusted annually), or above the maximum resource allocation (currently $84,120 in Wisconsin, adjusted annually). As adjusted, the maximum resource allowance in Wisconsin at the time Irene Blumer applied for Medicaid was then $76,740. Accordingly, if a couple's joint resources then totaled $200,000, the resource allowance was $76,740, rather than one-half of $200,000.

[7]"Attribution" and "deeming" are closely related concepts, although attribution is used particularly in § 1396r-5. In the spousal impoverishment context, "attribution" is self-defined as the procedure by which income and resources of one spouse are "considered available" to the other. See § 1396r-5(b)(2) and (c)(2). As the term suggests, attribution is a passive concept which, for example, permits but does not require one spouse to transfer income or resources to the other. Deeming is more generally a budgeting procedure in which income of a legally responsible relative is considered available to an applicant in determining an applicant's eligibility. For cases discussing deeming and availability of income and resources under pre-MCCA Medicaid law, *see Herweg v. Ray*, 455 U.S. 265 (1982); *Schweiker v. Gray Panthers*, 453 U.S. 34, 39-49 (1981); *cf.* 20 C.F.R. §§ 416.1160 and 416.1202 (2001) (deeming of income and resources under Supplemental Security Program).

(B). Once Medicaid eligibility is established for the institutionalized spouse, no resources of the community spouse can be deemed available to the institutionalized spouse (even if, by inheritance or otherwise, the community spouse later obtains significant additional resources). *See* subsection (c)(4); *see also* H. Rep. at 71, 1988 U.S.C.C.A.N. at 894.

The Income Provisions

Subsections 1396r-5(b) and (d) provide rules for the treatment of income, generally ensuring that the community spouse has a protected level of income on which to live after the institutionalized spouse qualifies for Medicaid. Subsection (b)(1) protects *any* income of the community spouse from being deemed available to the institutionalized spouse during months of institutionalization, incorporating the "name on the check" principle with regard to the community spouse. Under these rules, the community spouse's income is not considered in determining the Medicaid eligibility of the institutionalized spouse. Subsection (b) also provides special rules for the "attribution of income" of the institutional spouse for purposes of post-eligibility income adjustments authorized under subsection (d).

Once eligibility is established, subsection (d) protects the community spouse by allowing the institutionalized spouse to transfer part of his or her income to the community spouse, when necessary, before any remainder must be used to defray the costs of his or her institutional care. Subsection (d)(3) provides for the computation of the community spouse's minimum monthly maintenance needs allowance (MMMNA or minimum monthly need), an amount which ensures that the community spouse has income significantly above the poverty level. *See* subsection (d)(3)-(4). Subsection (d)(2) authorizes a

deduction from the institutionalized spouse's income if necessary to meet the minimum monthly need, a deduction called the community spouse monthly income allowance (CSMIA or income allowance[8]). This is the amount by which the minimum monthly need exceeds the monthly income otherwise available to the community spouse.

Remedial Provisions

Remedial provisions for notice and fair hearing are contained in § 1396r-5(e). In general, either spouse is entitled to a fair hearing if either is dissatisfied with the determination of the income allowance, the monthly income otherwise available to that spouse, the spousal share of resources under subsection(c)(1), the attribution of resources under subsection (c)(2) or the determination of the resource allowance. *See* subsection (e)(2)(A).

Under subsection (e)(2)(B), the hearing officer is authorized to revise the minimum monthly need upward under certain "exceptional circumstances." Under subsection (e)(2)(C) – the portion of 42 U.S.C. § 1396r-5 particularly at issue here – the hearing officer is authorized to revise the resource allowance when the "community spouse's income" is less than the minimum monthly need. (Increasing the resource allowance means that the institutionalized spouse has to spend less of his or her remaining resources, which would then go to the community spouse. The additional resources the community spouse may retain earns income that enables him or her to meet the minimum monthly need.)

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[8]The acronyms for terms defined by § 1396r-5, including CSRA, CSMIA and MMMNA, are commonly used in the cases and are set forth here for that reason. This brief uses both the shortened word forms and the acronyms.

B. Wisconsin's "income first" policy.

Wisconsin law, consistent with 42 U.S.C. § 1396r-5(e)(2)(C), requires the hearing officer to increase the amount of the resource allowance at a fair hearing if either spouse establishes that the standard resource allowance does not generate sufficient income to bring the community spouse's income up to the minimum monthly need. *Cf. id.*; Wis. Stat. § 49.455(8)(d). In doing so, however, Wisconsin allows increases in the standard resource allowance for the purpose of generating additional income for the community spouse only *after* considering potential income transfers from the institutionalized spouse to the community spouse. *See id.*[9] This policy, which Wisconsin has enacted by statute, *see* Wis. Stat. § 49.455(8)(d), is known as the "income first" rule.[10]

The "income first" approach is employed by more than thirty other states besides Wisconsin in their statutes, administrative rules or state Medicaid policies.[11] In effect,

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[9]Institutionalized spouses generally must use their income for the costs of care except for a $40 monthly personal needs allowance. The income that Wisconsin considers available to the community spouse is, thus, income that would ordinarily be spent on institutional care.

[10]*See, e.g., Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 799-800 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998); Ahmad, Omar N., *Medicaid Eligibility Rules for the Elderly and Long-Term Care Applicant*, 20 J. Legal Med. 251, *266 (June 1999).

[11]Research indicates that other "income first" states include Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming. Only a handful of states have codified the "income first" policy in a statute or administrative rule. *See* Colo. Rev. Stat. § 26-4-506 (1999); 10 Colo. Code Regs. 2505-10, § 8.112.13 (1999); Md. Regs. Code § 10.09.24.10-1.F.(4) (1998); N.J. Admin. Code § 10:71-5.7(d) (2000); Or. Admin. R. 461-160-0580(1)(f)(D) (2000).

the "income first" rule requires couples to use a greater portion of their resources for medical care, thereby postponing Medicaid eligibility. *See Cleary II*, 167 F.3d at 805.

Another group of states has adopted a "resource first" policy in the application of the fair hearing provisions of 42 U.S.C. § 1396r-5(e), as the Wisconsin Court of Appeals required in this case. Under the "resource first" approach, the institutionalized spouse is, in effect, permitted to transfer excess resources to the community spouse in order to generate additional income to raise his or her anticipated income to the level of the monthly needs allowance. Only if the additional resources fail to do so will the institutionalized spouse make his or her income available to the community spouse.[12] The effect of the "resource first" approach is to

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Wis. Stat. § 49.455(8)(d) (1999-2000). In most "income first" states, the policy is set forth in an administrative directive or policy manual, or simply represents the State Medicaid agency's interpretation of the "community spouse's income" within the context of 42 U.S.C. § 1396r-5(e)(2)(C). *See, e.g.*, Delaware Division of Social Services Medical Assistance Manual (DSSM) 20995.3.2 and 20970; Michigan Medicaid Program Administrative Manual, Item 600, p. 33; Minnesota Dept. of Human Services Health Care Programs Manual § 0909.25.05 (1998); South Carolina Department of Social Services Medicaid Policy Manual § 12.06. The relatively informal nature of some states' policies also accounts for the uncertainty about the precise number of states employing the "income first" approach. While the Solicitor General states that an informal federal survey questions the precise accuracy of the foregoing list, there is apparently no dispute that more than thirty states "currently use the income first method." *See* Brief for the United States as Amicus Curiae Opposing the Petition at 11 n.4.

[12]*See, e.g.*, 305 Ill. Comp. Stat. Ann. 5/5-4 (West 1998); Ill. Admin. Code, tit. 89, § 120.379 (West 2000); Mass. Gen. Laws ch. 118E, § 21A(c) (West, WESTLAW through ch. 161 of 2000 2d Ann. Sess.); Mass. Regs. Code tit. 130, § 520.017(C) (2000); *see also* Cal. Welf. & Inst. Code § 14006.4 (Deering, LEXIS through 2000 Supp., 1999 Sess.). Both Massachusetts and Ohio formerly used an "income first" approach, but have switched to the "resource first" approach. *See Thomas v. Com'r, Div. of Med. Assistance*, 682 N.E.2d 874, 877 n.8 (Mass. 1997) (noting statutory change); *Chambers*, 145 F.3d at 795; Ohio Admin. Code

render the institutionalized spouse eligible for Medicaid much sooner without having to spend excess resources down to the ordinary resource limit.

Finally, still other states employ a hybrid approach, leaving to the hearing officer's discretion whether to consider any permissible income transfer before increasing the standard resource allowance.[13]

Policy statements issued by the Secretary of the Department of Health and Human Services (HHS) and by its Health Care Financing Administration (HCFA),[14] the federal agency responsible for administration of the Medicaid program, have expressly approved use of the "income first" approach, as well as other "reasonable interpretations" of § 1396r-5.[15]

C. Facts.

This case arose as a proceeding for judicial review under the Wisconsin administrative procedure act, of an administrative decision of the petitioner WDHFS. The undisputed facts are set forth in the decisions of the Wisconsin Court of Appeals, District IV, and of the hearing examiner (*see* Pet-Ap. 2a-3a, ¶¶ 2-4; *see also* Pet-Ap. 24a-26a).

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§ 5101:6-7-02(C) (1999). *See generally Cleary v. Waldman*, 959 F. Supp. 222, 229-30 (D.N.J. 1997) ("*Cleary I*"), *aff'd*, *Cleary II*, 167 F.3d 801.

[13]*See Cleary I*, 959 F. Supp. at 229-30.

[14]"HCFA" recently changed its name to Centers for Medicare and Medicaid Services.

[15]*See* letter from HHS Secretary Shalala to Ohio Governor Voinovich and a series of HCFA policy statements included in the record (Pet-Ap. 78a-90a).

Irene Blumer was admitted to a nursing home in 1994. In December 1996, she, through her husband, Burnett Blumer, applied for Medicaid. The Green County, Wisconsin, Department of Human Services conducted an asset assessment to determine whether Irene was eligible for Medicaid benefits. The assessment indicated that the couple had total assets of $145,644 in 1994 when Irene was admitted to the nursing home. The county agency set Burnett's resource allowance at $72,822, or one-half of the couple's non-exempt assets. Based upon this resource allowance, the county agency established a total resource limit of $74,822—$72,822 for Burnett, as the community spouse, and $2,000 for Irene,[16] as the institutionalized spouse, before Irene would be eligible for Medicaid. On the date of Irene's Medicaid application, the couple had countable resources totaling $89,335. The county agency denied Irene's institutional Medicaid application because the Blumers were $14,513 above their resource limit of $74,822. *See* Pet-Ap. 3a, ¶ 2. (Put another way, the Blumers had to spend another $14,513 in resources before Irene would be eligible.)

Irene requested a hearing for the purpose of setting a higher resource allowance. *See* Wis. Stat. § 49.455(8)(d); 42 U.S.C. § 1396r-5(e)(2)(C). At the hearing, evidence established that Burnett's total monthly income was $1,702.45, including his social security income, an annuity and income from his resource share, which generated $377.85 per month in interest and dividends. This amount was about $25 below Burnett's minimum monthly need of $1,727 then established by state and federal law.[17] Irene

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[16]Individual Medicaid applicants are subject to a resource limit of $2,000. *See* 20 C.F.R. § 416.1205 (2001). The $2,000 limit applied to Irene by operation of 42 U.S.C. § 1396r-5(a)(1).

[17]The MMMNA in each state changes annually based on a statutory formula. *See* 42 U.S.C. § 1396r-5(d)(2)-(3). In Wisconsin, the current MMMNA is the lesser of $2,103 or $1,875 plus excess shelter expenses. *See* WI MA Handbook App. 23.6.0.

herself had monthly income of $1,162.71. She argued that because the resource allowance set by the county agency did not have the capacity to generate sufficient income to meet Burnett's monthly need, the examiner should increase the resource allowance. Increasing the resource allowance would also have allowed Irene to transfer assets to Burnett and avoided having to spend Irene's excess resources of $14,513 on the cost of care or for other purposes, making her eligible for Medicaid almost immediately (*see* Pet-Ap. 2a-3a, ¶ 3).

Under the "income first" rule, however, the simple solution to Burnett's $25 monthly shortfall was to consider $25 of Irene's monthly income available to him at the fair hearing. *Cf.* subsections (d)(1)(B) and (2). Applying Wis. Stat. § 49.455(8)(d), the hearing examiner concluded that he could not raise the resource allowance unless that was still necessary after Irene made her income available to Burnett. Because considering Irene's income available to Burnett would fulfill the minimum monthly need shortfall, the hearing examiner concluded that Burnett's resource allowance should not be increased and that Irene was correctly denied Medicaid benefits (*see* Pet-Ap. 3a, ¶ 4).

D. Judicial proceedings below.

The Circuit Court of Green County affirmed the WDHFS' decision in all respects (*see* Pet-Ap. 19a-22a) and Irene appealed. The Wisconsin Court of Appeals, District IV, reversed, holding that the "income first" rule of Wis. Stat. § 49.455(8)(d) conflicts with § 1396r-5(e)(2)(C) (*see* Pet-Ap. 1a-2a, ¶ 1).[18]

[18]The decision of the court of appeals court is published. *See Blumer v. DHFS*, 615 N.W.2d 647. Under Wisconsin law, the intermediate court has statewide jurisdiction and the published decision constitutes precedent binding on the WDHFS and the state courts, unless reversed or modified by the Wisconsin Supreme Court or, of course, this Court. *See generally In re Marriage of Cook v. Cook*, 208 Wis. 2d 166, 185-86, 560 N.W.2d 246 (1997).

According to the court, § 1396r-5(e)(2)(C) plainly and unambiguously requires the application of a "resource first" approach and does not permit the "income first" approach required by the Wisconsin statute. According to the court below, federal law requires that excess resources available to the institutionalized spouse be transferred to the community spouse to generate additional monthly income to make up the difference between the community spouse's personal income and the minimum monthly need *before* any available income possessed by the institutionalized spouse can be transferred to the community spouse (*see* Pet-Ap. 1a-2a, ¶ 1 and 7a-16a, ¶¶ 13-29).

The state court refused to give any deference to the informal views of either HCFA or the HHS Secretary. Rather, the court insisted, no deference is due because § 1396r-5(e)(2)(C) itself is plain and unambiguous (*see* Pet-Ap. 16a, ¶ 27).

The court below relied on two state intermediate appellate court decisions from Ohio decided in 1994. *See Kimnach v. Ohio Dept. of Human Serv.*, 645 N.E.2d 825 (Ohio App. 10 Dist. 1994), *appeal not allowed*, 644 N.E.2d 409 (Ohio St. 3d 1995); *Gruber v. Ohio Dept. of Human Serv.*, 647 N.E.2d 861 (Ohio App. 5 Dist. 1994), *appeal not allowed*, 646 N.E.2d 468 (Ohio St. 3d 1995). The court also gave no weight to more recent federal and state decisions unanimously concluding that the "income first" approach is based on a reasonable interpretation of 42 U.S.C. § 1396r-5 as a whole. *See Cleary II*, 167 F.3d at 811-12; *Chambers*, 145 F.3d at 802-04; *Cleary I*, 959 F. Supp. 222; *Thomas*, 682 N.E.2d at 879-81; and *Golf v. State Dept. of Social Services*, 697 N.E.2d 555, 558-63 (N.Y. 1998).

The WDHFS sought discretionary review by the Wisconsin Supreme Court on the federal question presented. That court denied review in an order dated September 12, 2000 (*see* Pet-Ap. 18a).

SUMMARY OF ARGUMENT

The spousal impoverishment provisions of the Medicaid Act, 42 U.S.C. § 1396r-5, were enacted in 1988 to address the impoverishing effects of the existing law on the spouses of persons requiring long-term institutional care, generally in nursing homes. The statute was also intended to curb abuses that allowed relatively affluent persons to shelter joint assets in the community spouse's name and to avoid contributing to the costs of long-term care for the institutionalized spouse. The purpose of the spousal impoverishment legislation was to protect the community spouse from pauperization by assuring that he or she has "a sufficient—but not excessive—amount of income and resources available" while the other spouse is institutionalized. *See* H. Rep. at 65, 1988 U.S.C.C.A.N. at 888.

Section 1396r-5 structures a complex mechanism for protecting a minimum level of income and both minimum and maximum levels of resources for use by the community spouse, once the institutionalized spouse begins receiving Medicaid benefits. *See* subsections (a)-(d). Superimposed on this complex administrative mechanism are remedial provisions, *see* subsection (e), which permit either spouse to request a fair hearing on any of the five components that define the spouses' financial relationship, including *inter alia*, the monthly income allowance from the institutionalized spouse and the determination of the resource allowance (the CSRA). *See* subsection (e)(2)(A)(i)-(v).

This case centers on one of the remedial provisions, subsection (e)(2)(C), which authorizes the revision of the

resource allowance if either spouse establishes that the resource allowance "is inadequate to raise the *community spouse's income*" to the level of the minimum monthly need by substituting for the standard resource allowance "an *amount* adequate to provide such a minimum monthly maintenance needs allowance" (emphasis added). The central dispute in this case is whether the language of subsection (e)(2)(C) is plain and unambiguous, as the court below decided; or whether the language is ambiguous and thus subject to interpretation, as petitioner WDHFS, HHS (the federal administering agency), two federal circuits and two state high courts unanimously agree.

The term "community spouse's income" is ambiguous because it can plausibly be interpreted two different ways based on the language of § 1396r-5 as a whole. As the court below apparently concluded, the term might be read to refer solely to income received in the community spouse's name (*see* Pet-Ap. 11a, ¶ 20). The more reasonable alternative interpretation, adopted by Wisconsin, by the federal agency and by the clear weight of state and federal appellate precedent, is that the term "community spouse's income" may include, in addition to his or her personal income as defined in subsection (b)(2), any income that the institutionalized spouse may transfer to the community spouse under subsection (d) in order to reach the minimum monthly need level, the MMMNA.

The uncertainty of the meaning of "community spouse's income" is exacerbated by the fact that subsection (e)(2)(C) neither requires nor prohibits use of the "income first" methodology, and does not specify whether the "amount" to be substituted for the resource allowance is in the form of income, or in the form of income-producing resources.

Section 1396r-5 is designed both to protect community spouses from impoverishment and effectively to force those

applying for Medicaid based on the statute's special eligibility provisions for married couples to contribute a share of their own resources to the costs of long-term care. The "income first" rule is based on a reasonable interpretation of the statute as a whole and on the purpose, function and context of the remedy provided by subsection (e)(2)(C).

The provision for raising the standard resource allowance, subsection (e)(2)(C), anticipates one post-eligibility problem facing community spouses--that of insufficient income to reach the level of the MMMNA. In the context of addressing the anticipated problem of inadequate income and the question whether the hearing officer should authorize an increase in the standard resource allowance, it is reasonable to consider anticipated post-eligibility income transfers from the institutionalized spouse to the community spouse as the "income first" rule does. Indeed, the legislative history of subsection (e)(2)(C) demonstrates that Congress expressly understood that states would be able to consider such future income transfers to the community spouse at the fair hearing.

Since 1993, the federal agency has issued a series of informal policy statements that has consistently permitted the states to employ the "income first" rule in administering the fair hearing provisions of § 1396r-5(e)(2)(C) (*see* Pet-Ap. 78a-90a). Under venerable precedent, recently reiterated by this Court, HHS' informal views are entitled to deference commensurate with their power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *U.S. v. Mead Corp.*, ___ U.S. ___, 121 S. Ct. 2164, 2172 (2001).

The Secretary's long-standing interpretation of § 1396r-5(e)(2)(C) is persuasive and, therefore, entitled to deference. Apart from the consistency of the agency's policy views with the text and legislative history of § 1396r-5, HSS has consistently recognized that the income first rule is a reasonable, permissible interpretation of the statute. Finally, HHS' views are entitled to deference because the "income

first" rule is consistent with the competing public policies the statute is intended to serve.

ARGUMENT

THE "INCOME FIRST" PROVISION OF THE WISCONSIN MEDICAID STATUTE REQUIRING THAT POTENTIAL INCOME TRANSFERS FROM THE INSTITUTIONALIZED SPOUSE BE CONSIDERED BEFORE THE STANDARD RESOURCE ALLOWANCE IS INCREASED IS CONSISTENT WITH THE FEDERAL SPOUSAL IMPOVERISHMENT STATUTE, 42 U.S.C. § 1396r-5.

A. The "income first" rule is a reasonable interpretation of § 1396r-5, which is silent and does not require either an "income first" or a "resource first" approach.

1. The term "community spouse's income" is ambiguous.

According to Blumer and the Wisconsin Court of Appeals, the lengthy sentence that comprises § 1396r-5(e)(2)(C) is susceptible to only one possible reading and is thus unambiguous (*see* text at 2-3 and 17, above). Given the notorious complexity of the Medicaid statute as a whole, the intricacy of the spousal impoverishment provisions of § 1396r-5 itself,[19] and the confusing syntax of

[19] *Cf. Gray Panthers*, 453 U.S. at 43 n.14 (quoting with approval Judge Friendly's description of the Medicaid Act as "'an aggravated assault on the English language, resistant to attempts to understand it'");

the text, the characterization of that sentence as "plain and unambiguous" strains credulity to the breaking point.

In fact, regardless of how many careful readings one gives this language, the meaning never becomes clear because the undefined statutory term "community spouse's income" together with the unexpressed referent of "amount," is susceptible to at least two plausible interpretations. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 410-11 (1993). "Community spouse's income" might be interpreted as referring solely to income received in the community spouse's name, as the court below apparently concluded (*see* Pet-Ap. 11a, ¶ 20). Alternatively as WDHFS, HHS and the clear weight of state and federal precedent recognize, the term may include both his or her income as defined in subsection (b)(2), together with any income the institutionalized spouse may transfer to the community spouse under subsection (d) in order to reach the level of the MMMNA.

The starting point for every case involving construction of a statute is the language of the statute itself. *See Beal v. Doe*, 432 U.S. 438, 444 (1977). *If* the language of a statute is plain and unambiguous, of course, """"that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."""" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990), *quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988).[20] In ascertaining whether the statute has a plain

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Tannler v. DHSS, 211 Wis. 2d 179, 191, 564 N.W.2d 735 (1997) (Abrahamson, C.J., concurring, describing MA statutes as extremely complex and "fairly . . . described as incomprehensible," "a confusing mix of means-tested programs and entitlements, and by uneasy compromises among different and often conflicting policies"); *Cleary II*, 167 F.3d at 807 (discussing the complexity of the spousal impoverishment provisions).

[20]This ordinary tenet of statutory construction corresponds with the first step of the *Chevron* analysis for cases involving an

meaning, the Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Chevron*, 467 U.S. at 842-43. A fundamental principle of statutory construction is that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. U.S.*, 508 U.S. 129, 132 (1993).

Looking to the language of § 1396r-5 then, the basic question here is: does the term "community spouse's income" have a plain meaning, viewed in the context of § 1396r-5(e)(2)(C) as a whole?

The Wisconsin Court of Appeals regarded this as a simple inquiry, readily answered by what it characterized as the "plain" and unambiguous language of the statute (*see* Pet-Ap. 11a, ¶ 19; 13a-14a, ¶ 23). In fact, although the court purported to find a plain, single meaning in subsection (e)(2)(C), the court engaged in an elaborate analysis of various other provisions of the statute in order to conclude that the statute was susceptible of a single reading, that requiring imposition of a "resource first" approach (*see* Pet-Ap. 11a-15a, ¶¶ 20-25).

First, the court employed its own definition of the word "income," the genesis of which it did not explain (*see* Pet-Ap. 5a-6a, ¶ 9). Based on its stated definition, the court below apparently limited the "income" of the community spouse solely to the personal income which that person receives in his or her own name each month (*see* Pet-Ap. 11a, ¶ 20; *cf.* subsection (b)(2)).

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administrative agency's interpretation of a statute it administers: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984).

The court also noted that there is no specific language *directing* that "imputation of the institutionalized spouse's income should occur before raising the CSRA," further relying on what it called "the separate treatment of each spouse's income throughout § 1396r-5" (Pet-Ap. 11a, ¶ 20).[21] Based on these factors, the court opined:

> [T]he specific language of the statute contemplates that the hearing examiner will separate the community spouse's income from that of the institutionalized spouse's and consider only the community spouse's income in its review of whether the CSRA that has been established is sufficient to avoid impoverishment of the community spouse.

Id.

WDHFS, on the other hand, regards "community spouse's income" as susceptible to a broader, more inclusive reading. "Community spouse" is specifically defined in the statute, *see* § 1396r-5(h), and the possessive form must be interpreted in the context of § 1396r-5 as a whole. *Cf. Deal*, 508 U.S. at 132. Seen in that context, "community spouse's income" may include, in addition to that spouse's personal income under subsection (b)(2), any income which the institutionalized spouse may transfer to the community spouse under subsection (d) for the very purpose of meeting his or her MMMNA. This reading of "community spouse's income" is supported by the fact that, just as there is no language *directing* the hearing officer to include income

[21]Presumably, the court was referring primarily to § 1396r-5(b)(1), which generally forbids deeming income of the community spouse as available to the institutional spouse during institutionalization, and subsection (b)(2), which limits attribution of income between spouses "except as otherwise provided in this section," *i.e.*, § 1396r-5. WDHFS disputes the significance and, in part, the accuracy of the court's description, as discussed below.

which may be transferred to the community spouse from the institutionalized spouse (*see* Pet-Ap. 11a, ¶ 20), there is no language in the statute *prohibiting* it either.

Furthermore, while § 1396r-5(b)(1) expressly forbids deeming the community spouse's income as available to the institutionalized spouse, there is no complimentary provision that prohibits deeming the institutionalized spouse's income as available to the community spouse. To the contrary, § 1396r-5(d) is devoted primarily to the establishment of a detailed mechanism by which transfers of income to the community spouse are expected to occur. In fact, this very income transfer feature is a primary provision of the statute, designed to ensure that the community spouse has a protected minimum level of monthly income on which to live.

Ambiguity in a statute may arise from what is unstated, as well as what is stated. Subsection (e)(2)(C) contains references to both resources and income in its initial clauses, and allows the hearing officer to "substitute[] for the community spouse resource allowance . . . an amount adequate to provide such a minimum monthly maintenance needs allowance." The referent of "amount," however, is unexpressed. Amount of "resources"? Amount of "income"? Congress does not say, and thereby creates additional ambiguity. However, the purpose of allowing a substitution – to provide an adequate income stream to the community spouse – strongly supports the inference that subsection (e)(2)(C) permits consideration of potential income transfers from the institutionalized spouse to the community spouse.

In short, the statute is silent concerning whether the "income first" methodology is permitted under § 1396r-5(e)(2)(C). The court below was clearly wrong when it concluded that the statute expressly forbids use of the "income first" methodology: the statute, in fact, neither forbids nor requires it.

The view that the term "community spouse's income" is ambiguous finds strong support in recent cases. "[T]he statute is complex and contains many interrelated provisions that make it impossible to attach a plain meaning to provisions in isolation. As such we find the definition of 'community spouse's income' to be ambiguous within the context of subsection [1396r-5](e)(2)(C)." *Cleary II*, 167 F.3d at 807.[22] On the other hand, two intermediate Ohio appellate courts have agreed with the Wisconsin court that the same language is plain and unambiguous. *See Gruber*, 647 N.E.2d at 863; *Kimnach*, 645 N.E.2d at 829-30.

This stark division renders unnecessary further discussion of whether the term "community spouse's income" is ambiguous. Rather, the very fact that courts have differed concerning the proper interpretation of the term demonstrates the existence of ambiguity more tellingly than pages of textual argument. *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 739 (1996) (observing that existing conflict between court decisions alone was sufficient to establish that the wording of the statute was ambiguous). "[T]he differing views of the various courts and agencies that have interpreted subsection (e)(2)(C) provide a strong indication that the subsection is ambiguous." *Chambers*, 145 F.3d at 802. The court below erred in concluding otherwise.

[22] *See also Thomas*, 682 N.E. 2d at 879-80; *Golf*, 697 N.E.2d at 558-59; *Cleary I*, 959 F. Supp. at 232; *Cleary II*, 167 F.3d at 809; *Chambers*, 145 F.3d at 802-03.

2. The "income first" rule is a reasonable interpretation of § 1396r-5 and of the fair hearing remedy provided by subsection (e)(2)(C).

a. Section 1396r-5 is designed to balance the needs and responsibilities of institutionalized and community spouses.

The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). Medicaid is a cooperative endeavor of the federal government and participating states, an example of "cooperative federalism." *Id.*, 448 U.S. at 308. The broad primary objective of the program is "to enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Beal*, 432 U.S. at 444. From the early years of the program, therefore, this Court has recognized that Medicaid is limited to the needy, *i.e.*, those "whose income and resources are insufficient" to provide for their own care, *id.*, and that the program itself is constrained by "the practicable," *i.e.*, by limitations on federal and state funding and other resources. *See id. Cf. Chambers*, 145 F.3d at 797-98.

The spousal impoverishment protections of the Medicaid Act share both the humanitarian goals of Title XIX and the limitations inherent in a needs-based program to which the state and federal governments devote substantial, but nevertheless limited resources. The original House

Report, quoted above at 5 and 16, described the purpose of § 1396r-5 as ending the "pauperization" of the community spouse by assuring that he or she has "*a sufficient—but not excessive—amount of income and resources available*" while the other spouse is institutionalized. *See id.* at 65, 1988 U.S.C.C.A.N. at 888 (emphasis added).

The Wisconsin Court of Appeals paraphrased the House Report incompletely and inaccurately by stating that the single goal was to protect the community spouse from being impoverished by having "sufficient income and resources to live independently" (*see* Pet-Ap. 5a, ¶ 8). The Wisconsin court read out of the statute Congress' express recognition that the spousal impoverishment provisions were a limited response to a much larger problem and that the spousal impoverishment protections themselves would also require couples to pay their fair share of long-term care expenses when one spouse is institutionalized.[23]

The court below also ignored the fact that Congress carefully circumscribed the extent to which community spouses would be protected from impoverishment. Congress set specific limits on the amount of income and resources that would be protected for the community spouse, allowing exceptions only under the particular circumstances generally described in the fair hearing provisions of § 1396r-5(e)(1) and (2).

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[23]In addition to the quoted passage from the House Report, *see* 134 Cong. Rec. 20,692 (1987) (Representative Tauke, noting the goal of changing unfair impoverishment policies and "ensur[ing] that no one escapes contributing a fair share to nursing home care costs"); *id.* at 20,708, 20,752 and 20,758 (Representatives Weiss, Snow and Gray (Ill.)); *see also* 133 Cong. Rec. 29,353 (1987) (Senator Mikulski, the chief sponsor of an amendment adding spousal impoverishment protections to the Senate bill, characterizing the proposal as "modest and balanced"); 134 Cong. Rec. 13,231, 13,243, 13,261 and 13,733 (1988) (Representatives Rostenkowski, Waxman and Kennelley and Senator Pryor (describing the limitations)).

True, one of those exceptional circumstances occurs when the community spouse's income is not adequate to reach the level of the minimum monthly need or MMMNA, and Congress expressly allowed the remedy of raising the resource allowance under subsection (e)(2)(C). However, the dual, sometimes competing purposes of the spousal impoverishment provisions--protecting the community spouse from impoverishment and requiring elderly couples to pay their fair share of long term care expenses--must be kept in mind in interpreting § 1396r-5 generally and subsection (e)(2)(C) in particular.

Contrary to the Wisconsin court's constricted view of the statutory purpose, other courts have consistently recognized the competing purposes the spousal impoverishment provisions were designed to serve. The Third Circuit has aptly summarized the competing policy goals:

> The goal of the MCCA was to provide sufficient income and resources for the community spouse while also ensuring that a fair share of the couple's resources were [sic] employed for the care of the institutionalized spouse. . . .
>
> . . . [A] related goal of the MCCA is to preclude couples who possessed substantial resources from qualifying for Medicaid. . . . The 1988 Act curbed [resource] sheltering practice[s] by attributing certain amounts of the couple's overall resources to each spouse for eligibility purposes. The MCCA seeks to achieve a balance between spousal impoverishment and apportioning medical

> costs appropriately. It does this through a series of complex and interlocking provisions.

Cleary II, 167 F.3d at 805-06.

Similarly, the Supreme Judicial Court of Massachusetts has said: "[T]he MCCA struck a balance between preventing impoverishment of the community spouse and ensuring that no one avoided contributing his or her fair amount to medical care." *Thomas*, 682 N.E.2d at 876. *Accord*: Cleary *I*, 959 F. Supp. at 229; *Chambers*, 145 F.3d at 798.

b. The "income first" methodology is consistent with the purpose, function and context of subsection (e)(2)(C).

The federal spousal impoverishment statute, § 1396r-5 as a whole, governs the determination of Medicaid eligibility when one spouse is institutionalized and the other--the community spouse--is not. Subsection (e)(2)(C), "Revision of community spouse resource allowance," creates an administrative remedy for couples when the normal eligibility calculation, conducted at the local administrative level, results in the denial of eligibility for the institutionalized spouse based on excess resources, even though the community spouse will lack income of his or her own sufficient to reach the MMMNA once those excess resources are spent and the institutionalized spouse becomes MA-eligible.[24]

[24]By definition, cases such as this one arise only when the community spouse lacks sufficient monthly income of his or her own to reach the protected MMMNA, and the institutionalized spouse has *both* income and resources that are available to transfer to the community spouse to provide the extra income needed to meet his or her monthly maintenance need.

The fair hearing process, in this context, is entirely anticipatory: it provides a remedy for a couple to resolve the problem of inadequate community spousal income *before* resources which might be used to insure that protected level of income are dissipated and no longer available. The anticipatory nature of the subsection (e)(2) fair hearing remedy is key to understanding it, because the remainder of § 1396r-5 focuses on past events that determine eligibility--*e.g.*, the couple's total resources as of the time of initial institutionalization--and the status quo at the time of application--*e.g.*, the couple's income and resources as of that date.

The *purpose* of subsection (e)(2)(C) is to provide a method for ensuring that the community spouse has a minimum level of income--the MMMNA—on which to live after the institutionalized spouse becomes eligible for Medicaid and "the community spouse's income" alone is insufficient to do so. The fair hearing *function* is anticipatory, designed to solve that future problem--inadequate income--before it is too late to employ excess resources for that purpose. However, the Wisconsin court, Blumer's arguments and the two Ohio intermediate courts completely disregard the forward-looking nature of the subsection (e)(2)(c) hearing. *See* Pet-Ap. 1a-17a; *Kimnach*, 645 N.E.2d 825; *Gruber*, 647 N.E.2d at 868.

In support of its view that the "community spouse's income" could not include potential income transfers from the institutionalized spouse authorized under subsection (d), the court below insisted that the institutionalized spouse's income could not be deemed available to the community spouse at the fair hearing because "establishing the CSRA is a *pre-eligibility* determination, not a *post-eligibility* one"

(Pet-Ap. 12a, ¶ 21 (emphasis in original)). Moreover, according to the Wisconsin court, "§ 1396r-5(d)(1) directs the institutionalized spouse to transfer income to the community spouse *after* eligibility has been determined, not before" (*id.*) (emphasis in original).

The fact that the income transfer itself does not actually take place until after eligibility occurs is beside the point. Neither the language of § 1396r-5(b) and (c) nor the purpose of the subsection (e)(2)(c) hearing compel the conclusion that the hearing officer cannot consider potential income transfers from the community spouse. Indeed, the recent "income first" cases persuasively reject the artificial limitation the Wisconsin court inferred from subsection (d) that potential income transfers may be considered only after eligibility has been established.[25]

Practical constraints require that adequate resources be allocated to the community spouse before they are spent down and become unavailable for the community spouse's support. The reason for an advance determination of the resource allowance (during both the initial eligibility determination process and at the fair hearing) is to avoid unnecessary resource depletion before the institutionalized spouse qualifies for Medicaid. *See Cleary I*, 959 F. Supp. at 232. The determination of the ordinary resource allowance as well as the opportunity to raise that allowance at the fair hearing must be made *prior to* eligibility because, if the determination is delayed until the point of actual eligibility, the excess resources will have already been spent. It is then too late to transfer them to the community spouse if needed to provide additional income.

[25]*See generally Cleary I*, 959 F. Supp. at 232-33; *Thomas*, 682 N.E.2d at 879-80; *Golf*, 697 N.E.2d at 559; *Chambers*, 145 F.3d at 802; *Cleary II*, 167 F.3d at 809-10.

The pre-eligibility hearing remedy permits a spouse to show in anticipation of eligibility that if the resources are spent down to the level mandated by the standard resource allowance, the community spouse's minimum monthly need will not be met because of inadequate income. At the same time, interpreting subsection (e)(2)(C) to prohibit consideration of anticipated income transfers available from the institutionalized spouse under subsection (d) "frustrate[s] the design of the statute to provide for a transfer of assets only in an amount sufficient to ensure the community spouse's post-eligibility monthly income need." *See Cleary I*, 959 F. Supp. at 232.

The same practical constraints do not apply to protecting the income of the institutionalized spouse. There is no similar concern about spending down the institutionalized spouse's income because the income available for transfer from that spouse is paid regularly, usually monthly. As a result, during the ordinary eligibility determination process, the amount of the community spouse's income allowance need not be addressed prior to the determination of eligibility because that income will continue to be available after eligibility occurs.[26]

During the fair hearing process, however, there are no practical barriers to prevent the hearing examiner from addressing simultaneously the level of the resource allowance, the question of eligibility *and* the issue of

[26]*See Chambers*, 145 F.3d at 802 ("Because this concern is not relevant on the income side of the equation, the income allowance need not be determined on a pre-eligibility basis.").

anticipated income transfers from the institutionalized spouse because each affects the other. Thus,

> [i]n light of the detailed provisions of subsection (d) designed to make available to the community spouse as much, but only as much, of the institutionalized spouse's income as necessary to ensure her monthly need, it would be anomalous to construe subsection (e)(2)(C) in such a manner as to exclude the institutionalized spouse's income from the calculation . . . .

Cleary I, 959 F. Supp. at 232.

Other courts have rejected the argument embraced by the Wisconsin court that income transfers may not be considered at the fair hearing because there is no express provision authorizing pre-eligibility income transfers. *See Chambers*, 145 F.3d at 802. Rather, "[t]he better reading of subsections (b) and (d) is that these subsections provide a framework for preserving income for the community spouse by limiting the amount of the eligible institutionalized spouse's income which may be used to pay medical expenses." *Id., citing Thomas*, 682 N.E.2d at 879.

Moreover, the proper interpretation of subsection (e)(2)(C) must take into account the design of each of the fair hearing provisions of subsection (e)(2), rather than addressing subsection (e)(2)(C) alone. *See Cleary II*, 167 F.3d at 810. As that court explained, subsection (e)(2)(A) permits a fair hearing "if either spouse is dissatisfied with the determination of any one of the five components that create the community spouse's income," including the monthly income allowance from the institutionalized spouse, the amount of income otherwise available to the community spouse, the computation of the

spousal resource share, the attribution of resources and the determination of the CSRA. *Id.*

Based on this observation, the court concluded:

> The fact that the "fair hearing" subsection, (e)(2), starts in (e)(2)(A) with a recitation of the five components that make up the community spouse's income would indicate that a revision of one of those components, the CSRA, should be made only with a consideration of the other four. The five elements are interrelated and an adjustment of one will affect the other four. For this reason, a spouse may not be able to demonstrate an inadequacy of the CSRA, pursuant to (e)(2)(C), if a larger community spouse monthly income allowance is possible.

Cleary II, 167 F.3d at 810.

Indeed, if the hearing examiner is required to ignore anticipated income transfers from the institutionalized spouse to the community spouse under subsection (d), as the court below insisted, the spousal income transfer mechanism carefully created in subsection (d) will be irrelevant and entirely unavailable in cases where the institutionalized spouse has a high level of excess resources which would otherwise be available to defray the costs of long-term care. Subsection (d) itself "makes it clear that a certain portion of the community spouse's income may come from the income of the institutionalized spouse." *Cleary II*, 167 F.3d at 809. Indeed, that is the very purpose of subsection (d), yet the Wisconsin Court of Appeals' reading "would make (d) superfluous." *See id.*

The difference in the timing of when the resource allowance and the income allowance are actually determined

derive simply, if not exclusively, from practical concerns relevant to the usual initial eligibility determination process. These timing concerns have no practical significance during the remedial fair hearing process, where the hearing officer must simultaneously address the question of the institutionalized spouse's MA eligibility and the claimed inadequacy of the community spouse's anticipated income level in the context of whether to raise the amount of the resource allowance for the community spouse.

The Wisconsin Court of Appeals ignored the purpose and function of the fair hearing remedy by seizing on the timing of when the institutionalized spouse's income is actually transferred to the community spouse, as grounds for prohibiting consideration of income available from the institutionalized spouse at the fair hearing. However, "the better reading," *cf. Chambers*, 145 F.3d at 802, is that state hearing officers may, consistent with § 1396r-5 as a whole, consider income transferable to the community spouse from the institutionalized spouse under subsection (d) at a fair hearing under subsection (e)(2)(C).[27]

3. Congress understood that states would be able to consider income transfers from the institutionalized spouse to the community spouse during fair hearings under subsection (e)(2)(C).

The legislative history of the spousal impoverishment provisions of § 1396r-5 supports the inference that states

[27]*See Cleary II*, 167 F.3d at 811; *Chambers*, 145 F.3d at 804; *Golf*, 697 N.E.2d at 559; *Thomas*, 682 N.E.2d at 879-81; *Cleary I*, 959 F. Supp. at 232-34.

should be permitted to employ an "income first" rule at a fair hearing under subsection (e)(2)(C).[28]

The original House bill did not contain a provision allowing the community spouse to increase the resource allowance if his or her monthly income fell below the "minimum monthly maintenance needs allowance." *See* H. Rep. at 70, 1988 U.S.C.C.A.N. at 892-93. Instead, the initial House version restricted the sources of income available to the community spouse for meeting the MMMNA to the community spouse's own income, any income generated by the CSRA and transfers of income from the institutionalized spouse. *See id.* at 893-95; H. Rep. at 70-72; *see also* Conf. Rep. at 260-62, 1988 U.S.C.C.A.N. at 1038-40.

The original Senate bill did not contain any Medicaid spousal impoverishment provisions. In an effort spearheaded by Senators Mikulski, Mitchell and Kennedy, the bill was amended during floor debate to include spousal impoverishment provisions similar to the House bill. *See* 133 Cong. Rec. 23,950-58 (1987). However, the Senate version as approved expressly excluded from the eligibility determination "resources [available to the institutionalized spouse] that are necessary to produce income that is available to the community spouse." *See* Conf. Rep. at 263, 1988 U.S.C.C.A.N. at 1041; *see also* 133 Cong. Rec. 29,429-30 (1987). In other words, without providing for a fair hearing on the subject, the Senate version included a mandatory "resource first" method of protecting for the community spouse additional resources above the level of the resource allowance, as well as the income resulting from those resources.

[28]The Wisconsin Court of Appeals refused to consider evidence from the legislative history, based on its insistence that the statute was unambiguous (*see* Pet-Ap. 15a, ¶ 26).

The Conference Committee, however, adopted neither the House nor the Senate proposal regarding adjustments to the resource allowance. Unlike the House version, the compromise reached in conference authorized an adjustment to the resource allowance if needed to increase the community spouse's income to the level of the MMMNA (*see* Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043). Unlike the Senate bill, the Committee did not achieve this result through a mandatory transfer of additional resources to the community spouse. *See* Conf. Rep. at 264-67, 1988 U.S.C.C.A.N. at 1042-45. Rather, the compromise authorized the provision for a fair hearing embodied in subsection (e)(2)(C). *See id.*

Tellingly, the Conference Committee described the legislative compromise that resulted in the fair hearing provisions of 42 U.S.C. § 1396r-5(e) as follows:

> The agreement does not exclude from countable resources those assets necessary to produce income available to the community spouse . . . . Instead, the agreement provides that either . . . spouse may request a fair hearing as to whether the community spouse resource allowance is adequate . . . . If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*) . . . .

Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043 (emphasis added); *see also id.* at 1045, Conf. Rep. at 267 (repeating the identical italicized language in explaining the fair hearing provisions directly).

Clearly, if Congress had intended to mandate the "resource first" approach required by the court below, it could have done so directly by adopting the language in the Senate bill. It did not. Instead, Congress adopted a compromise that authorizes an increase in the resource allowance at a fair hearing, recognizing that such adjustments may "tak[e] into account any other income attributable to the community spouse" (*see* Conf. Rep. at 265 and 267). Thus, the legislative history strongly supports the conclusion that Congress affirmatively contemplated that states would consider, at a fair hearing under subsection (e)(2)(C), income transferable to the community spouse from the institutionalized spouse under subsection (d).

B. The Secretary's longstanding, consistent interpretation permitting states to employ the "income first" rule is persuasive and entitled to judicial deference under *Skidmore*.

1. Congress has given the HSS Secretary exceptionally broad authority to interpret the Medicaid Act.

In the case of the Medicaid statutes, Congress has explicitly delegated to the HHS Secretary exceptionally broad authority to promulgate regulations defining eligibility requirements for Medicaid benefits, including standards for determining the availability of income and resources. *See* 42 U.S.C. § 1396(a)(17)(B) and (D) (1994 and Supp. 2000); *see also Gray Panthers*, 453 U.S. at 43; *cf. Batterton v. Francis*, 432 U.S. 416, 425 (1977) (construing nearly identical authority under another section of the Social Security Act). Plainly, the agency's broad rulemaking authority includes the setting of standards for the availability

of income and resources under the spousal impoverishment provisions of § 1396r-5 as well.

Confronted with an ambiguous statutory term, the courts generally defer to a permissible interpretation espoused by the agency entrusted with its implementation. *Cf. Good Samaritan Hospital*, 508 U.S. at 414.[29] "In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton*, 432 U.S. at 425. Consequently, when the Court determines that Congress has not directly addressed the precise question presented, the Court does not simply impose its own construction on the statute, as it would absent an interpretation by the administering federal agency. *See Chevron*, 467 U.S. at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Despite the Secretary's broad rulemaking authority to set eligibility standards for institutionalized spouses under § 1396r-5, the Secretary has not yet adopted formal legislative rules[30] interpreting the spousal impoverishment provisions.[31] While the federal agencies that administer the spousal impoverishment provisions of the Medicaid Act have not adopted formal regulations, neither have they remained

[29]*See Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 530 (1985) (absent a statutory definition of a Medicaid term, it is appropriate to consider the Secretary's interpretation of that term).

[30]*See generally* 1 K.C. Davis and R.J. Pierce, Jr., *Administrative Law Treatise*, 228-47, §§ 6.2-6.3 (3d ed. 1994); R.A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 42-63 (1990); *see also Batterton*, 432 U.S. at 425 n.9.

[31]Had the Secretary done so, this case would not likely exist, because such rules, if reasonable, would be entitled to binding deference. *See Chevron*, 467 U.S. at 843-44; *Mead Corp.*, 121 S. Ct. at 2171.

silent. *See Cleary II*, 167 F.3d at 806. HCFA and the HHS Secretary have issued policy memoranda and letters informally interpreting § 1396r-5 (*see* Pet-Ap. 78a-90a). In these pronouncements, HHS, through HCFA and the Secretary, has interpreted § 1396r-5(e)(2)(C) as permitting states to use the "income first" method in order to raise the community spouse's income to the minimum maintenance needs level during the fair hearing process (*id.*).

This Court has long recognized that informal policy interpretations by the agency charged with administration of a statute are entitled to some level of deference so long as they are informed, reasonable and persuasive.[32] Policy statements and guidelines for the administration of a federal program, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Skidmore*, 323 U.S. at 140. "[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead Corp.*, 121 S. Ct. at 2175, *citing Skidmore*, 323 U.S. at 139-40.

This Court recently reiterated the vitality of *Skidmore's* central holding: "'The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Mead Corp.*, 121 S. Ct. at 2172, *quoting Skidmore*, 323 U.S. at 140.

[32]*See Skidmore*, 323 U.S. at 140; *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Mead Corp.*, 121 S. Ct. at 2171-76. *Cf. Chevron*, 467 U.S. at 842-45.

Accordingly, policy interpretations contained in formats such as HCFA "Regional State Letters" or in letters of the HHS Secretary are entitled to deference commensurate with their power to persuade. *See Christensen*, 529 U.S. at 587. The Wisconsin court erred by refusing to give *any* deference to the views of the state and federal agencies which administer the Medicaid program, based on its view of the statutory language as plain and unambiguous (*see* Pet-Ap. 14a and 16a, ¶¶ 6 and 27). *Cf. Mead Corp.*, 121 S. Ct. at 2171 and 2175-76.

The primary factor supporting the persuasiveness of HSS' longstanding policy permitting states to use the "income first" methodology is the agency's informed analysis of the text of § 1396r-5 generally and of the function and purpose of the fair hearing remedy provided by subsection (e)(2)(C) discussed at 28-34, above. In addition, the legislative history, discussed at 34-37, above, strongly supports the persuasiveness of HSS' view that states are permitted to employ the "income first" methodology in administering the fair hearing provisions of that subsection. *Cf. Cleary I*, 959 F. Supp. at 233; *Chambers*, 145 F.3d at 803-04; *Cleary II*, 167 F.3d at 810-11. These two factors alone warrant recognizing HSS' policy views as persuasive and entitled to deference under *Skidmore*.

2. HSS policy has consistently recognized that states are permitted to use the "income first" methodology.

Skidmore and *Mead Corp.* suggest a variety of other factors that courts may consider when examining the persuasiveness of an agency policy judgment in a particular case. *See id.*, 121 S. Ct. at 2171 and 2176; *Skidmore*, 323 U.S. at 140. One of those factors is the consistency of

the informal agency interpretation over time. *See id.*, 121 S. Ct. at 2171.

The consistency--or alleged lack of it--in HSS' treatment of the "income first" approach is the one deference factor on which the Wisconsin Court of Appeals chose to comment, noting without discussion "that DHHS has not interpreted the statute consistently" (*see* Pet-Ap. 16a, ¶ 27). If the court meant to suggest that HHS has waffled about its interpretation of the term "community spouse's income" or about whether the "income first" policy is a reasonable interpretation of § 1396r-5, the court below is wrong, as a review of the available evidence reveals.

In a policy statement attached to a "Chicago Regional State Letter" in 1993, HCFA expressly interpreted the term "community spouse's income" as including "whatever portion of the monthly income allowance the institutionalized spouse will make available to him or her" (*see* Pet-Ap. 83a). The statement indicated that the State "should include this income as available to the community spouse when it counts that spouse's own income" (*id.*). The cover letter and the statement, taken together, appeared to direct that states use the "income first" approach at a fair hearing under § 1396r-5(e)(2)(C) (*see* Pet-Ap. 78a-83a).

Shortly thereafter, in March 1994, HCFA issued a memorandum to "All Regional Administrators" clarifying the December 1993 policy statement (*see* Pet-Ap. 84a-86a). The HCFA memorandum acknowledged that the provisions of § 1396r-5 are "extremely complicated" and, "in places ambiguous and incomplete," citing the fair hearing provision of § 1396r-5(e)(2)(C) in particular (*see* Pet-Ap. 84a). The agency expressly disclaimed intent to mandate the "income first" approach set forth in the prior policy statement, explaining that "[s]tates have the option to use the 'income first' rule or to apply some other reasonable interpretation of the law until we have issued final regulations which

specifically address this issue" (Pet-Ap. 86a). Another "Regional State Letter" was issued in July 1994 to the same effect (*see* Pet-Ap. 87a-89a).

In March 1996, HHS Secretary Shalala reiterated this interpretation permitting both the "income first" rule and "other reasonable interpretation[s]"[33] of § 1396r-5(e)(2)(C) in a letter to the Governor of Ohio, characterizing the income first policy as a "legally permissible interpretation of the Medicaid statute" (*see* Pet-Ap. 90a).

According to these HHS policy statements, then, the term "community spouse's income" as used in § 1396r-5(e)(2)(C) may include consideration of potential income transfers from the institutionalized spouse to the community spouse under subsection (d) (*see* Pet-Ap. 78a-90a). Based on that view, the federal agency has expressly authorized states to adopt the "income first" method or to apply another "reasonable interpretation" of the law until HHS issues final administrative rules which specifically address this issue (*see id.* at 86a and 89a).

Obviously, HSS has been notably consistent in its view that states may employ an "income first" approach.

[33]None of the HHS' policy statements in the record expressly refer to, define or approve a "resource first" approach, including the broad, unlimited "resource first" approach mandated by the Wisconsin Court of Appeals (*see* Pet-Ap. 14a-16a, ¶¶ 24-29). *Cf. Ford v. Iowa Dept. of Human Services*, 500 N.W.2d 26, 29-32 (Iowa 1993) (approving use of a "resource first" approach based on the value of a single premium life annuity that would yield the community spouse sufficient income to reach the MMMNA; expressly *disapproving* what it called the "interest only" version of a resource first approach mandated by the court below in this case). Because states employ different versions of a "resource first" approach, this brief focuses primarily on the reasonableness of the "income first" approach expressly permitted by HCFA without analyzing other interpretations which may be used in other states.

The first of the HHS-HCFA policy statements in the record, dating from 1993, expressly construed the term "community spouse's income" as including "whatever portion of the monthly income allowance the institutionalized spouse will make available to" the community spouse (*see* Pet-Ap. 83a). That interpretation has never been withdrawn by the federal agency. Furthermore, during the eight-year period since 1993, the agency has never wavered in considering the "income first" approach embodied in Wis. Stat. § 49.455(8)(d) to be a reasonable and acceptable interpretation of the statute (*see* Pet-Ap. 78a-90a; *see also* Brief for the United States as Amicus Curiae, opposing the Petition at 9-14).

What HCFA *did* change shortly after issuing the 1993 policy statement (Pet-Ap. 78a-83a) was the initial suggestion that the "income first" approach is the *only* reasonable or permissible interpretation of the fair hearing provisions of § 1396r-5 (*see* Pet-Ap. 84a-89a). But if the statute is ambiguous, HHS' recognition that other reasonable interpretations of the statute are possible casts no shadow on the validity of the agency's long-held view that the "income first" approach is an entirely reasonable interpretation of the statute as well. Thus, the Wisconsin court's characterization of the agency's informal policy pronouncements as "inconsistent" is simply mistaken.

3. HHS' views are entitled to *Skidmore* deference because the "income first" rule is consistent with the competing public policies § 1396r-5 and Title XIX are intended to serve.

The conclusion that HHS' views are persuasive and entitled to deference under *Skidmore* is reinforced by their consistency with the principal, sometimes competing, dual

purposes the spousal impoverishment provisions of § 1396r-5 are designed to serve, *i.e.*, to insure that community spouses are able to retain sufficient, but not, excessive, income and resources with which to live,[34] and to avoid using public funds to subsidize the costs of long-term care for individuals who can afford to pay for such care from their own resources. *Cf. Cleary II*, 167 F.3d at 805-06; *Thomas*, 682 N.E.2d at 876.

When the competing purposes of the spousal impoverishment provisions of § 1396r-5 are fairly considered, it is apparent that permitting states to employ the "income-first" rule embodied in Wis. Stat. § 49.455(8)(d) strikes a reasonable balance between those competing purposes. The "income first" approach enables the community spouse to receive a protected level of income well above the federal poverty level while also permitting, pursuant to subsection (e)(2)(C), a community spouse whose "income" is inadequate to reach that protected level, access to a portion of the institutionalized spouse's income and, if necessary, a larger share of income-producing assets on which to live.

At the same time, the "income first" approach permitted by HHS effectively requires couples to bear a reasonable share of the cost of caring for the institutionalized spouse, in turn conserving medical assistance funds for other similarly-situated individuals.[35] The "income first" rule, in short, effectively requires couples to contribute to the costs of long term care, yet protects income and assets *at the levels specified by Congress and the states* for the use of community spouses, thus attempting to ensure institutional equity in the allocation of limited public funds.

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[34]*See generally* § 1396r-5; H. Rep. at 65, 1988 U.S.C.C.A.N. at 888.

[35]*See Chambers*, 145 F.3d at 797; *Cleary I*, 959 F. Supp. at 232; *Thomas*, 682 N.E.2d at 880-81.

A distinctive feature of the longstanding agency interpretation of § 1396r-5(e)(2)(C) rejected by the Wisconsin court is HHS' effort to protect the discretion of the individual states to define their own state policy with regard to subsection (e)(2)(C), allowing states the option to choose between the "income first" approach and "other reasonable interpretations" of the statute (*see* Pet-Ap. 84a-90a). This aspect of HHS' policy is simply an application of the concept of "cooperative federalism" embodied in the Medicaid program as a whole. *Cf. Harris*, 448 U.S. at 308.[36]

Finally, as recognized in the cases, the broad, unlimited version of the "resource first" approach mandated by the court below can readily be abused to nullify the statutory goal of requiring institutionalized spouses to pay for the costs of their own care within the monetary limits set by Congress for the protection of community spouses.[37] This potential for abuse may not be a necessary feature of a more carefully defined "resource first" approach. *Cf. Ford*, 500 N.W.2d at 29-32. Nonetheless, the version of the "resource first" approach mandated by the court below is unquestionably open to abuse by couples seeking to shelter significant amounts of resources without having to use them to pay their "fair share" of long-term care costs.[38]

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[36]*See also Batterton*, 432 U.S. at 431-32 (in context of a program based on cooperative federalism, the Court would not "lightly infer a congressional intention to preclude the Secretary from recognizing legitimate local policies in determining eligibility").

[37]*See Cleary I*, 959 F. Supp. at 232; *Thomas*, 682 N.E.2d at 880-81; *Golf*, 697 N.E.2d at 560; *see also Ford*, 500 N.W.2d at 32. *See also* Petition at 18-20; Reply to Brief in Opposition at 3-5.

[38]As described in the Petition at 19-20 n.20, Wisconsin now attributes a median amount of $992 per month or $11,928 annually of the institutionalized spouse's income to the community spouse in order to provide the latter with income up to the level of the MMMNA. If a community spouse is permitted, under the "resource first" approach

In contrast, the "income first" rule permitted by HHS and required in Wisconsin by statute strikes a reasonable balance. Although closely pegged to the monetary limits on resources and income set by Congress for protection of community spouses, the "income first" rule has a built-in safety valve--the fair hearing itself--to accommodate those unusual circumstances where a higher resource allowance is justified. In addition, the HHS policy permitting, but not requiring, states to adopt the "income first" approach enables the states themselves to make difficult accommodations between maximizing benefits to individual recipients while guaranteeing, to the extent possible, that sufficient funds are available to the greatest number of eligible individuals under Medicaid.

The spousal impoverishment provisions were intended as one part of the Medicaid "safety net."[39] They were never designed, however, fully to insulate elderly couples from the difficult, often painful choices necessarily associated with limitations on income and resources at any stage of life. HHS policy permitting but not requiring states like Wisconsin to employ the "income first" approach in the interpretation of § 1396r-5 is entirely consistent with the often competing policies the federal spousal impoverishment provisions are intended to serve.

---

mandated by the court below, to retain assets generating that amount of income in lieu of the current income transfer required by Wis. Stat. § 49.455(8)(d), the community spouse will be able to retain substantial income-producing assets well above the current Wisconsin standard maximum resource allowance of $84,120, *see* n.6 above, in order to generate that amount of monthly or annual income. For example, resources valued at approximately $340,000 are necessary to generate monthly income of $992, assuming a 3.5% rate of return. At the same time, under the broad "resource first" approach mandated by the court below, the institutionalized spouse becomes eligible for Medicaid much sooner than under the "income first" approach.

[39]*See* Remarks of Senator Mikulski, 133 Cong. Rec. 29,353.

As argued above, HHS' views permitting the states to adopt the "income first" policy required by Wisconsin law are longstanding and consistent, and are based on an eminently reasonable interpretation of § 1396r-5 as a whole. In addition, the HHS' policy views are supported by the legislative history and by the statutory purposes § 1396r-5 is intended to serve. Accordingly, HHS' views are persuasive and thus entitled to deference under *Skidmore*.

CONCLUSION

For the reasons argued above, the decision of the Wisconsin Court of Appeals should be reversed and the record remanded with directions to reinstate the judgment of the trial court.

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No. 00-952

In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ Of Certiorari To The Wisconsin Court Of Appeals, District IV

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QUESTION PRESENTED

Whether the plain language of 42 U.S.C. § 1396r-5(e)(2)(C) (1994 and Supp. 2000), the language of 42 U.S.C. § 1396r-5 as a whole, and the income eligibility methodologies of the Supplemental Security Income program applicable to the Medicaid program prohibit the "income-first" rule of WIS. STAT. § 49.455(8)(d)(1999-2000), which requires that potential post-eligibility income transfers from the institutionalized spouse be included in "the community spouse's income" for purposes of obtaining a substituted community spouse resource allowance under § 1396r-5(e)(2)(C).

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STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

1. In General

The federal Medicaid program was created in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v (1994 and Supp. 2000). The program is jointly funded by federal and state revenues. Participating states administer the program, but must, as a condition of receipt of federal funds, operate their programs in compliance with the federal statute. 42 U.S.C. § 1396a(a). The Department of Health and Human Services (HHS) through its Centers for Medicare & Medicaid Services (CMS), formerly known as the Health Care Financing Administration (HCFA), has oversight authority over the Medicaid program at the federal level.

The broad purpose of the Medicaid program is to provide federal funding to allow states to furnish medical assistance to families with dependent children and to aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. § 1396. The State of Wisconsin has chosen to participate in the Medicaid program, which it calls the "Medical Assistance" program. WI. STAT. §§ 49.43-49.99 (1999-2000).

Medicaid was originally enacted primarily as a health insurance companion program to the Aid to Families with Dependent Children (AFDC) program and the

three then-existing state-based income maintenance programs for poor elderly, blind, and disabled Americans.[1] These programs were combined as the "Supplemental Security Income" (SSI) program in 1972. 42 U.S.C. §§ 1381-1385. It also provided health care coverage to people whose income exceeded program limits, but whose health care costs consumed their excess income. 42 U.S.C. §§ 1396a(a)(10)(C) and 1396d(a). As enacted, the Medicaid program was truly a welfare program for the very poor.

Over the years the Medicaid program has increasingly become a program for the working poor and, in some cases, the middle class. As Congress has struggled to do something about the growing number of Americans who lack adequate health insurance, it has repeatedly turned to the Medicaid program as its vehicle to extend government assistance to the uninsured and underinsured. These expanded eligibility groups include individuals with income and assets significantly above the poverty level.[2]

---

[1] Old Age Assistance, 42 U.S.C. § 301 et seq. (1970 ed.); Aid to the Blind, 42 U.S.C. § 1201 et seq. (1970 ed.); and Aid to the Permanently and Totally Disabled, 42 U.S.C. § 1351 et seq. (1970 ed.).

[2] For example, the Medicaid program now covers children with severe health problems without regard to their parents' income or assets, the "Katie Beckett" program, 42 U.S.C. § 1396a(e)(3) and disabled workers with incomes up to 250% of poverty and assets up to $15,000 (the "Medical Assistance Purchase Plan," 42 U.S.C. § 1396a(a)(10)(A)(ii)(XIII), Wis. Stat. § 49.472(3) (1999-2000). Through waivers of federal law HHS allows states, using federal Medicaid funds, to fashion its own programs to cover working families (*see*, e.g., Wisconsin's "Badgercare" program, which allows families with incomes up to 200% of poverty to participate. Wis. Stat. § 49.665(4)(a)1.

2. The Medicare Catastrophic Coverage Act of 1988

The Medicare Catastrophic Coverage Act (MCCA) expanded the Medicaid program from a strict welfare program to a "safety-net" program for working families and retired working families in the area of long-term care. *See* 42 U.S.C. § 1396r-5. In 1988, Congress passed MCCA to rectify serious inadequacies in the Medicare program and severe inequities in the Medicaid program. *See* Pub. L. No. 100-360, 102 Stat. 683 (1988); H.R. Rep. No. 100-105(II) at 65, *reprinted at* 1988 U.S.C.C.A.N. at 888.

3. MCCA's Spousal Impoverishment Prevention Provisions

a. The Pre-MCCA Problem

The MCCA's Medicaid provisions addressed the inequity in the arbitrary way Medicaid treated married couples when one spouse was confined to a nursing home. Before MCCA, the Medicaid program forced many couples to liquidate and spend down virtually all of their joint assets before the nursing home spouse could become Medicaid eligible. All too frequently the spouse at home, usually the wife, was left with no savings or income-producing property. Further, after the nursing home spouse became eligible, most of his income (oftentimes all) had to be paid to the nursing home. Often the spouse at home was left to subsist on her income alone. In many cases she became utterly impoverished, unable to afford

an independent existence in the community, and compelled to seek welfare herself. In other cases, if the at-home spouse happened to have retained title to the couple's assets, the couple did not have to spend any assets on the nursing home spouse's care.

The principal statutory culprits in this arbitrary system were the "deeming provision" of 42 U.S.C. § 1396a(a)(17) and the asset transfer prohibitions of 42 U.S.C. § 1396p. The deeming provision allowed states to consider or "deem" assets held in the name of the nursing home spouse as entirely available to pay the nursing home bill. The transfer prohibition prevented the nursing home spouse from transferring any assets in his name to the at-home spouse even for the laudable purpose of keeping his spouse independent in the community and off welfare. *See* Pub. L. No. 97-248, 96 Stat. 371 (1982) creating 42 U.S.C. § 1396p(c); *see also* WIS. ADMIN. CODE § HFS 103.08 entitled "Divestments prior to August 9, 1989."

b. The MCCA Solution

The goal of the 1988 MCCA was to stop this "spousal impoverishment" by allowing the at-home spouse, called the "community spouse" in MCCA, to retain sufficient income and assets to maintain independence at home. It did so in two ways. First, it set forth new rules for the treatment of income after the nursing home spouse, called the "institutionalized spouse" in MCCA, became eligible for Medicaid. 42 U.S.C. § 1396r-5(d). It also established a new resource exclusion, the "community spouse resource allowance" (CSRA), that would be disregarded

when the institutionalized spouse applied for Medicaid. 42 U.S.C. §§ 1396r-5(c) and (f).

With respect to post-eligibility treatment of income, § 1396r-5(d) allowed a Medicaid eligible institutionalized spouse to allocate some or all of his or her monthly income to the community spouse in order to maintain the community spouse's income at a minimum level, called the "minimum monthly maintenance needs allowance" (MMMNA). States were given considerable flexibility in establishing this MMMNA. Since 1992 the MMMNA must be at least 150% of the poverty level for a family of two and states were permitted to set the maximum as high as $1,500. 42 U.S.C. § 1396r-5(d)(3). Adjusted annually for inflation as required by 42 U.S.C. § 1396r-5(g), in 2001 the minimum is $1,406.25 and the maximum is $2,175. Therefore, states currently have discretion to set their MMMNAs anywhere between $1,406.25 and $2,175.[3]

Next, MCCA provided formulas for local agency officials to use to calculate the CSRA. Under these formulas, a state retains significant flexibility to establish its CSRA amount. The formulas provide that the CSRA may be the greater of (1) the standard CSRA allowance, which is set by the state between $12,000 and $60,000; or (2) half of the couple's assets, but that half could not be greater than $60,000. 42 U.S.C. §§ 1396r-5(f)(2)(A)(i) and (ii).

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[3] In 1996 Wisconsin reduced its MMMNA to 200% of the poverty level for a family of two. WIS. STAT. § 49.455(4)(c)1.a. (1999-2000). In 1997 that translated into $1,725, in 2001 it is $1,935.

A substitute CSRA is available to those who are denied eligibility under the calculations above and request a hearing pursuant to 42 U.S.C. § 1396r-5(e)(2). The "substituted" CSRA was designed as a failsafe mechanism to guarantee adequate protection for the community spouse in those unusual situations where the standard CSRA was inadequate. At the hearing an individualized CSRA must be "substituted" for the formula CSRA if the formula CSRA fails to generate income sufficient to bring the "community spouse's income" up to the MMMNA. 42 U.S.C. § 1396r-5(f)(2)(A)(iii).

The specific issue raised by this appeal is whether potential post-eligibility transfers of income from an institutionalized spouse under § 1396r-5(d) are included in a "community spouse's income" as that term is used in 42 U.S.C. § 1396r-5(e)(2)(C).

Congress also took care to weave these spousal impoverishment provisions into the larger fabric of the Medicaid Act. It did so by operation of 42 U.S.C. § 1396r-5(a). Petitioner and the United States have given short shrift to subsection (a), yet it is absolutely critical to an understanding of § 1396r-5's place within existing Medicaid law. Subsection (a) does this in three specific ways. First, it supersedes all other provisions of Title XIX that are inconsistent with the new section and explicitly supersedes the problematic "deeming provision" of 42 U.S.C. § 1396a(a)(17). 42 U.S.C. § 1396r-5(a)(1). The reason is obvious: § 1396a(a)(17) had caused spousal impoverishment in the first place by allowing states to deem jointly held resources as entirely available to the institutionalized spouse. Second, it deliberately retained preexisting Medicaid law with respect to determining "what

constitutes income or resources" and "the methodology and standards for determining and evaluating income and resources." 42 U.S.C. § 1396r-5(a)(3). This explains why Congress did not, in the context of § 1396r-5(e)(2)(C), need to define the phrase "community spouse's income." Third, it prohibited other groups of potential Medicaid applicants the right to point to the more generous income and asset provisions contained in § 1396r-5 and demand similar treatment. 42 U.S.C. § 1396r-5(a)(2).

These provisions are critically important because they manifest the intent of Congress to enact the spousal impoverishment protections within the larger Medicaid Act – not as stand-alone provisions. By operation of § 1396r-5(a)(1) and (3), the treatment of income for eligibility purposes is determined exactly as it had been prior to MCCA.

4. MCCA Left Income Eligibility Determinations Intact.

Income determinations for nursing home Medicaid eligibility have always been governed by the rules that apply in determining eligibility for the Supplemental Security Income program. 42 U.S.C. § 1396a(r)(2)(A) mandates application of the SSI rules to these eligibility determinations. In addition, 42 U.S.C. § 1396a(r)(2)(A) provides that the methodology for determining income and resource eligibility "may be less restrictive, and shall be no more restrictive, than the methodology" used in the SSI program.

Subparagraph (B) of § 1396a(r)(2) then provides that a methodology is "no more restrictive" if "additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance" by the methodology. HHS implemented the SSI methodology mandate of § 1396a(r)(2) at 42 C.F.R. § 435.601 (2000).

The SSI program, in turn, uses the "name on the title" rule when it considers income for determining eligibility. *See* 20 C.F.R. §§ 416.1100-1182 (2000) which discuss the rules for treatment of income in detail. Most important, the SSI program does not permit deeming of income *away* from the applicant *to* the applicant's ineligible spouse. Pursuant to the name on the title rule, the amount of income that might potentially be allocated to the community spouse after the institutionalized spouse is eligible may not be deducted for eligibility purposes. *See*, e.g., 42 C.F.R. § 435.831. The spousal income allocation does not occur until after the institutionalized spouse is Medicaid eligible, when the institutionalized spouse's cost share to the nursing home is calculated. 42 U.S.C. § 1396r-5(d)(1)(b).

B. APPLICATION OF THE SPOUSAL IMPOVERISHMENT PROTECTION PROVISIONS

Given this statutory framework, states have developed two different methods of determining the substituted CSRA under the hearing provision of 42 U.S.C. § 1396r-5(e)(2)(C). Under the "resource-first" rule, the CSRA is increased to provide additional assets for the community spouse if the income paid in the name of the

community spouse is not sufficient to meet the MMMNA. Under the alternative, the "income-first" rule, eligibility is more limited because the CSRA is not increased if the community spouse's income *plus* the income that may be transferred from the institutionalized spouse post-eligibility is sufficient to meet the MMMNA.

The income-first rule has the effect of denying or postponing eligibility for an institutionalized spouse whose community spouse relies on income generated by savings, rather than Social Security, pensions, annuities or employment. If the institutionalized spouse in these circumstances has sufficient income to permit post-eligibility transfers, the income-first rule will typically require the couple to deplete the savings or other assets upon which the community spouse depends before the institutionalized spouse will be Medicaid eligible. If the institutionalized spouse dies before the community spouse, the community spouse may be left destitute because the assets needed to provide a minimal income were spent on nursing home care while the institutionalized spouse remained Medicaid ineligible. This depletion of savings is not required under the resource-first rule because the substitute CSRA preserves the assets that will allow the community spouse to receive income to fund the MMMNA without relying on income from the institutionalized spouse.

C. FACTUAL BACKGROUND

The Blumers' situation illustrates the effect of these alternative rules. When Irene Blumer entered the nursing home in November 1994 she and her husband Burnett

owned assets totaling $145,644. In February 1997, two months after Irene applied for Medicaid, the Blumers had less than $90,000 left. (Pet. App. at 2a ¶2.) In slightly over two years their life savings had been reduced by 38 percent. The nursing home bill and other living expenses were consuming their savings at the rate of over $2,000 a month.

When Irene applied for Medicaid her monthly income was $926.99 in Social Security benefits and $335.72 in pension benefits for a total of $1,262.71. Burnett's monthly income included Social Security benefits of $1,015.15 and $309.45 from an annuity for a total of $1,324.60. In addition, the Blumers' remaining assets produced $377.85 per month which raised Burnett's income up to $1,702.45.[4] (Pet. App. at 25a-26a.)

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[4] Petitioner's statement of facts incorrectly states that the $377 in interest income was generated by Burnett's "resource share" – meaning, apparently, the standard CSRA of $72,822. (Pet'r. Br. at 13.) In fact, the record establishes that the interest income was generated by the couple's total remaining assets – approximately $89,000. (R. Doc. 4 at 22.) This error has led to the petitioner's erroneous statement that "[u]nder the 'income-first' rule, however, the simple solution to Burnett's $25 shortfall was to consider $25 of Irene's monthly income available to him at the fair hearing." (Pet'r. Br. at 14.) In fact, the shortfall would have been $25 ($24.55 to be precise) even if all $87,335 ($89,335-$2,000 for Irene) of Burnett's assets had been "substituted" for the standard CSRA of $72,822. For purposes of the ultimate legal issue for this Court to decide, petitioner's mistake is not material. However, we note it because we refer to the Blumers' actual situation at several points in this brief for illustrative purposes.

Irene's Medicaid application was denied because her available assets exceeded the formula CSRA set for Burnett of $72,822 (half of the couple's assets when Irene entered the nursing home) plus the $2,000 she was allowed to keep. She appealed. At the hearing Irene argued that the resource-first rule entitled Burnett to a substituted CSRA which included all $89,000 of the couple's assets, because all of the income from all of the assets would raise his monthly income only to $1,702, an amount still below the MMMNA of $1,725. Instead, the hearing examiner applied the income-first rule and found Irene ineligible. (Pet. App. at 2a-3a ¶¶2-4.) As he put it, "[a]s the couple's total monthly income exceeds $2,400 *even without the asset income listed in Finding of Fact #7*, it appears upon allocation of the institutionalized spouse's income no assets would need be retained to generate income for the community spouse." (Pet. App. at 31a) (emphasis in original). The effect of the examiner's ruling was to compel the Blumers to continue the rapid depletion of their remaining resources until only the standard CSRA of $72,822 remained. Assuming depletion would continue at $2,000 per month the decision delayed Irene's eligibility for some six months.

Had the examiner applied the resource-first rule the outcome would have been very different. Irene would have been eligible for Medicaid immediately. Burnett would have been able to keep what remained of the couple's life savings to provide for his own needs – both while Irene lives and after she passes away. Further, after eligibility was established Irene would be able to allocate a small portion of her monthly income ($24.55) to her husband to bring his income up to the MMMNA of

$1,725. Irene would pay the vast majority of her income, over $1,200, to the nursing home to defray the expense of her care to the State of Wisconsin.

SUMMARY OF ARGUMENT

The petitioner's argument is built on the faulty premise that the statute is ambiguous. The Wisconsin Court of Appeals recognized this and correctly held that the plain meaning of the phrase "community spouse's income" in § 1396r-5(e)(2)(C) can only refer to income actually received or possessed by the community spouse. Nothing in the surrounding provisions of the Act leads to any other conclusion; by its very terms, § 1396r-5(d) applies only after eligibility is established, not before. Under resource-first, § 1396r-5(e)(2)(C) and § 1396r-5(d) complement each other rather than create ambiguity.

The petitioner also fails to understand the applicability of SSI rules to Medicaid. Congress, however, did understand this basic fact and continued their application in MCCA by enacting 42 U.S.C. §§ 1396r-5(a) and 1396a(r)(2). Subsection 1396r-5(a) supersedes inconsistent provisions of the Medicaid Act and preserves the income and asset determination methodologies under the SSI program that have always been applicable to the Medicaid program. Subsection 1396a(r)(2) confirms the preexisting Medicaid rule that SSI methodologies are the base from which Medicaid financial eligibility is determined. Because the SSI rules use name-on-the-title when determining income for eligibility purposes, the income-first rule, which does not, is prohibited.

Petitioner's confusion about the word "amount" in § 1396r-5(e)(2)(C) is hard to fathom. The word "amount" plainly refers to a substituted "resource" allowance and cannot reasonably be read to refer to income. The term is not ambiguous.

The resource-first rule serves the overall remedial purpose of the Act to *end* spousal impoverishment, while the income-first rule serves only to *postpone* it until the institutionalized spouse dies. MCCA was enacted to allow a community spouse the financial security to live independently in the community throughout life. The income-first rule requires a community spouse to spend resources that could otherwise be used to maintain ongoing independence. Once these resources are spent, they are unavailable to the community spouse to fund any income reduction created by the death of the community spouse. The resource-first rule also serves the specific remedial purpose of § 1396r-5(e)(2)(C) because it makes people eligible for benefits who would otherwise be ineligible.

Contrary to petitioner's claim, the hearing at which the "substituted" CSRA is considered determines present eligibility and is not "anticipatory." At the hearing, the appeal will be dismissed if the increased CSRA does not result in immediate eligibility. Hearing examiners have no authority to issue "advisory" CSRAs.

MCCA itself compels all couples to pay their fair share of nursing home costs. Prior to MCCA, some spouses could protect unlimited amounts of resources if their resources were titled in the name of the community spouse. Under MCCA, all couples are treated equally,

without regard to which spouse retains title to the couple's assets. The MMMNA amount also limits the CSRA to the amount of resources necessary to fund the MMMNA. The rest must be spent. Finally, resource-first allows more of the institutionalized spouse's income to be paid to the nursing home, thereby permanently defraying costs to the Medicaid program.

The cooperative federalism envisioned by Congress in MCCA allows states significant flexibility to set the MMMNA and the CSRA within broad parameters, but leaves states no discretion to create new income eligibility rules. States still retain ultimate control over the costs associated with the resource-first rule through the flexibility Congress explicitly delegated.

The drafting history of MCCA supports resource-first. Both the House and Senate versions of MCCA used resources to aid couples who were not adequately protected by the standard CSRA. The Conference Committee ultimately replaced these provisions with the resource-first hearing process under § 1396r-5(e)(2)(C), but did not deviate from the underlying principle of using resources as the funding source for the MMMNA.

Income-first proponents have misinterpreted the phrase "taking into account any other income attributable to the community spouse" in MCCA's legislative history. In MCCA, the term "attribute" requires the separate treatment of spousal income and therefore supports the resource-first rule.

Finally, no deference is owed to HHS's income-first interpretation because it is contrary to the controlling

statute and because it is not reasonable, consistent, thoughtful or persuasive.

ARGUMENT

CONGRESS EXPLICITLY AND DELIBERATELY MANDATED THE RESOURCE-FIRST RULE OF 42 U.S.C. § 1396r-5(e)(2)(C).

A. THE WISCONSIN COURT OF APPEALS CORRECTLY CONCLUDED THAT § 1396r-5(e)(2)(C) UNAMBIGUOUSLY REQUIRES THE "RESOURCE-FIRST" RULE

1. The Phrase "community spouse's income" Is Self Explanatory

This Court applies a standard analysis to determine whether a word or phrase within a statute is unambiguous. The court looks to the statutory language to determine if Congress' intent is revealed by the actual words used by the Congress. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corporation v. Cartier, et al.*, 486 U.S. 281, 291 (1988). Under this analysis there is no question that Congress mandated the resource-first rule when it enacted § 1396r-5(e)(2)(C). The statutory provision which contains the disputed language, § 1396r-5(e)(2)(C), states as follows:

> Revision of community spouse resource allowance
>
> If either such spouse establishes that the community spouse resource allowance (in relation to

> the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

The Wisconsin Court of Appeals applied the standard approach articulated in *K-Mart* and found that Congress clearly mandated the resource-first rule when it enacted § 1396r-5(e)(2)(C). The court began its examination with the words of the statute itself. It first found "this language very specifically directs the increase of the CSRA to an amount sufficient to generate additional income." (Pet. App. at 11a, ¶20.) The court then examined the disputed term "community spouse's income" and engaged in a plain language analysis. In so doing, the court noted that the statute referred to the "community spouse's income." The statute did not say "the couple's income or the community spouse's income plus the institutionalized spouse's income." (Pet. App. at 11a, ¶20.) The court did not twist or contort the language of the statute – it simply read it and found that the words Congress chose conveyed their meaning clearly and unambiguously.

The court of appeals got it right. By choosing the possessive in the phrase "community spouse's income," Congress clearly expressed its intent that the income *possessed* by the community spouse was the income that would be measured. Nothing in the statutory language suggests that imputed income from the institutionalized spouse was somehow contemplated in the reference to

the "community spouse's income." As written, the phrase simply cannot be read to require that the institutionalized spouse make any income available to the community spouse as a precondition to the establishment of a substituted CSRA. The plain language of the statute is not ambiguous.

The court of appeals did not end its inquiry there. It proceeded to examine § 1396r-5(e)(2)(C) in the context of the post-eligibility income transfer provision of § 1396r-5(d); the very subsection of § 1396r-5 that petitioner, as well as several of the income-first courts, claims causes ambiguity. *See Cleary v. Waldman*, 959 F.Supp. 222, 232 (D.N.J. 1997) (Cleary I); *Cleary ex. rel. Cleary v. Waldman*, 167 F.3d 801, 809 (3d Cir.) (Cleary II), *cert. denied*, 528 U.S. 837 (1999); *Chambers v. Dept. of Human Services*, 145 F.3d 793, 802 (6th Cir. 1998), *cert. denied*, 525 U.S. 964 (1998); *Thomas v. Comm'r, Div. Of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997).

The court started by noting that the opportunity to obtain the substituted CSRA occurs only at the time an *eligibility* determination is made. It then specifically discussed § 1396r-5(d)(1), the provision which allows institutionalized spouses to allocate income after they have been determined eligible. The court emphasized the statutory language in this section which clearly states that income allocation applies *"after an institutionalized spouse is determined . . . to be eligible for medical assistance."* (Pet. App. at 11a, ¶20) (emphasis in original).

As the court of appeals recognized, the purpose of § 1396r-5(d) is to assure that the institutionalized spouse will be able to allocate income to his community spouse

rather than use it to defray Medicaid expenses *after* eligibility is established. By its very terms § 1396r-5(d) applies only after the institutionalized spouse is eligible for Medicaid. (Pet. App. at 13a, ¶22.) It would be absurd to construe it to cast ambiguity on a statutory provision that relates exclusively to establishing eligibility. Put another way, § 1396r-5(d) is clearly and unambiguously irrelevant for purposes of establishing Medicaid eligibility.[5]

In fact, subsections (e)(2)(C) and (d) coexist together quite peacefully as written. Indeed, they complement each other. Under the resource-first rule the fair hearing provision of § 1396r-5(e)(2)(C) aids couples at the eligibility determination stage of the proceedings by assuring that assets still available to produce income for the community spouse will be preserved for that purpose. The income transfer provision aids couples after eligibility is established. A transfer from the institutionalized spouse will fill some or all of the gap if the couple's substituted CSRA, as determined at the fair hearing, is still insufficient to generate income up to the MMMNA. This will happen in virtually all cases because even the substituted

[5] The decision of the Wisconsin Court of Appeals is in accord with *Kimnach v. Ohio Dept. of Human Serv.*, 645 N.E.2d 825 (Ohio App. 10 Dist. 1994), *appeal not allowed*, 644 N.E.2d 409 (Ohio St. 3d 1995); *Gruber v. Ohio Dept. of Human Serv.*, 647 N.E.2d 861 (Ohio App. 5 Dist. 1994), *appeal not allowed*, 646 N.E.2d 468 (Ohio St. 3d 1995). The court of appeals considered, but rejected the conclusions of the income-first courts that it was impossible to attach a plain meaning to any provision in the Medicaid Act. It stated: "While we may agree that these provisions are complex, we cannot agree that every provision is ambiguous simply because of the complexity of the statute as a whole." (Pet. App. at 9a, 10a, ¶¶16-18.)

CSRA is limited by the actual amount of assets the couple owns at the time the institutionalized spouse applies for Medicaid.

The Blumers' situation illustrates this point. As a result of the court of appeals decision, Burnett is eligible for a substituted CSRA that is $14,513 above the standard CSRA of $72,822 and Irene's asset limit of $2,000. Excluding this amount, Irene was immediately eligible for Medicaid. Yet this substituted CSRA is still insufficient to bring Burnett's income up to the MMMNA. There simply are not enough assets to fund the entire MMMNA.

Only at that point do the post-eligibility spousal impoverishment *income* provisions come into play. Irene can then allocate a small portion of her income ($24.55 to be exact) in order to bring Burnett's income up to the MMMNA.

2. The Income-First Rule Is Prohibited By Operation Of 42 U.S.C. § 1396r-5(a).

Petitioner, the United States and many of the income-first courts have urged that the income-first rule "is not prohibited."[6] They believe that, absent a definition of "community spouse's income," the statute is ambiguous and thereby permits income-first. That argument is misplaced because the statute's language concerning income determination is not ambiguous. As previously discussed, the one area left nearly undisturbed by the MCCA reforms was the treatment of income for eligibility

[6] *See, e.g. Chambers*, 145 F. 3d 793, 802; *Thomas*, 682 N.E.2d 874, 879.

purposes. *Supra* at 6-8. Section 1396r-5(a)(1) supersedes only those provisions of previous law in conflict with the new provisions of MCCA. It does not affect "the determination of what constitutes income . . . " or the methodologies used to evaluate income. 42 U.S.C. § 1396r-5(a)(3).

In addition, Congress confirmed its retention of the SSI rules for the treatment of income by enacting § 1396a(r)(2) concurrently with MCCA, but making it retroactively effective to October 1, 1982.[7] Congress knew

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[7] The creation of § 1396a(r)(2) in MCCA was the culmination of a longstanding dispute between Congress and HCFA regarding what it meant to apply the SSI methodologies to the Medicaid program. According to Congress, HCFA had been misinterpreting the various statutory provisions that required the application of the SSI financial standards and methodologies to the Medicaid program. HCFA had been misinterpreting the SSI requirements to be the *least* and *most* liberal that states could utilize. This misinterpretation severely restricted states' flexibility to be *more* generous (not less) than a strict application of the SSI rules allowed. In order to absolutely clarify its intent, Congress enacted § 1396a(r)(2) as a "conforming amendment" to MCCA. As the House Committee on Energy and Commerce put it "[t]o avoid any possible ambiguity, the bill provides that a methodology is considered to be 'no more restrictive' if, using the methodology, individuals qualify for Medicaid even though they would not be eligible were the SSI methodology used, and individuals who would be eligible for Medicaid under the SSI methodology would not be ineligible under the State's medically needy methodology." Thus the bill specifically provided states with the flexibility to be more generous, but not less generous, than the SSI rules allowed. Finally, the House made the new language retroactive to October 1, 1982, the date the provisions that HCFA was misinterpreting had been enacted. *See* H.R. Rep. No. 100-105(II) at 74-75, 1988 U.S.C.C.A.N. at 897-898. The House's

that for income, the name-on-the-title rule applied for Medicaid eligibility purposes. Therefore, in order to retain the SSI rules regarding the treatment of income for spousal impoverishment purposes, Congress was required to do nothing. In other words, it is precisely because Congress was silent on this issue in MCCA that the name-on-the-title rule applies for the eligibility purpose contemplated in § 1396r-5(e)(2)(C).

Further, according to 42 U.S.C. § 1396a(r)(2)(B), a state may only deviate from the SSI methodologies, including those governing the treatment of income, if doing so would *not* make "individuals who are otherwise eligible for Medical Assistance . . . ineligible for . . . such assistance." Applying § 1396a(r)(2)(B) to the income-first rule leads to the inescapable conclusion that the income-first rule denies eligibility to individuals who would be otherwise eligible if the SSI methodologies were followed.

To the extent Congress was "silent" on the issue in § 1396r-5(e)(2)(C) it was because it had *already spoken* quite loudly on the issue. Contrary to the position proffered by petitioner (Pet'r. Br. at 23) and particularly the United States (U.S. Br. at 25), Congress did *not* leave a gaping hole in § 1396r-5 which it expected the states or HHS to fill.

"conforming amendment" was adopted in the final version of MCCA except that it was *expanded* to include the "optionally categorically needy" as well as the "medically needy" thereby making it applicable to all nursing home applicants, no matter what their technical Medicaid status. 42 U.S.C. § 1396a(r)(2). *See* H.R. Conf. Rep. No. 100-661 at 268, 1988 U.S.C.C.A.N. at 1046.

Further, the provision in § 1396r-5(b)(1) prohibiting income deeming *from* the community spouse to the institutionalized spouse (Pet'r. Br. at 23) does not by negative inference authorize income-first's "reverse deeming." A main accomplishment of the spousal impoverishment revisions was to end, once and for all, the deeming of a community spouse's income to the institutionalized spouse in the limited context of an application for institutional Medicaid. The specific prohibition on community spouse income deeming was necessary because of the problematic "deeming provision" of § 1396a(a)(17) applicable to Medicaid generally under which the income of a nonapplicant spouse may be considered available to the applicant spouse in an eligibility determination. Because no Medicaid or SSI rule authorized "reverse deeming" it was unnecessary to specifically prohibit it.

It is unlikely that Congress considered the possibility that HHS or states would invent a theory that permitted states to take income *away* from an institutionalized applicant (thereby making that applicant, theoretically at least, *poorer*) for the purpose of *denying* that applicant benefits. With all due respect to Congress, there are only a limited number of schemes by which states would frustrate Congress' intent that Congress can be expected to foresee and specifically and redundantly foreclose.

3. Petitioner's Novel Contention That "Amount" Is Also Ambiguous Is Patently Meritless.

Petitioner now, for the first time, has decided that it is also confused by the term "amount" as it appears in § 1396r-5(e)(2)(C), claiming that "[t]he referent of

'amount' is unexpressed" and suggests that it may refer to either resources or income. (Pet'r. Br. at 23.) This argument borders on the preposterous. This is because the term "amount" is immediately preceded by the phrase "for the community spouse resource allowance under subsection (f)(2) of this section."[8]

It simply could not be clearer that "amount" refers to resources. It is being "substituted" for the standard community spouse resource allowance mandated by § 1396r-5(f)(2). If "amount" referred to "income" as petitioner asserts that it could, the result would be the "substitution" of the community spouse resource allowance with an income transfer from the institutionalized spouse. The effect of this interpretation would be the *elimination* of the community spouse resource allowance altogether, leaving no assets to the community spouse. Statutory constructions that cause absurd results are generally not favored. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938), *see* also *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-201 (1993). Congress could not possibly have intended this result. Neither the income-first courts, nor any of the *amici* appearing in support of petitioner have ever found any ambiguity in the term "amount." *See Cleary I*, 959 F.Supp. 222; *Cleary II*, 167 F.3d 801; *Chambers*, 145 F.3d 793; *Golf v. State Dept. of Social Services*, 697 N.E.2d 555 (N.Y. 1998); *Thomas*, 682 N.E.2d 874. This argument accentuates the contrived nature of the income-first rule.

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[8] In petitioner's brief this phrase is curiously absent, having been replaced by " . . . " (Pet'r. Br. at 23.)

4. The Resource-First Rule Serves The Statute's Broad Remedial Purpose To End Spousal Impoverishment While The Income-First Rule Frustrates It.

a. The Purpose Of MCCA Was To End Spousal Impoverishment, For As Long As The Community Spouse Lives – Not Merely While The Institutionalized Spouse Lives.

The overarching purpose of the Medicaid provisions of MCCA was to "end spousal impoverishment,"[9] not merely delay it. The "income-first" interpretation of the statute does nothing to serve that purpose. Instead, it causes the rapid depletion of resources that could guarantee an income stream for the *life* of the community spouse. Under income-first, the institutionalized spouse cannot actually transfer income to the community spouse before Medicaid eligibility is established because the institutionalized spouse needs that income to pay the nursing home bill. In virtually all cases the institutionalized spouse's income is insufficient to pay the nursing home bill. The resources that should be saved in order to generate a permanent income stream for the community spouse are spent covering the shortfall on the nursing home bill when the income-first rule is applied. Therefore, the imputed "transfer" of income from the institutionalized spouse that is assumed under the income-first rule is fictional because Medicaid eligibility is precluded by the income-first rule.

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[9] H.R. Rep. No. 100-105(II), 69 (1988) 1988 U.S.C.C.A.N. at 857, 892.

Further, once the couple's resources have been depleted so that the institutionalized spouse is eligible for Medicaid, spousal impoverishment is *temporarily* averted. After Medicaid eligibility is established, a portion of the institutionalized spouse's income becomes available to the community spouse. However, if the institutionalized spouse dies, the income stream from the institutionalized spouse is often reduced or, in many cases, terminated. By that point the resources which would earlier have been available to generate income for the community spouse are spent. The community spouse's income is permanently reduced.

The Blumers' case underscores the point. If Irene predeceases Burnett, the income stream from her will terminate immediately. Burnett will not be entitled to a survivor's benefit because his Social Security payment exceeds that of his spouse. (Pet. App. at 25a.) Burnett would have been entitled to a survivor's benefit from his spouse's pension only if Irene had died before the 10 year guarantee period expired – which was in 1998. (R. Doc. 4 at 83-84.) The reality is that when Irene dies her income dies too.

It was not the purpose of MCCA to end spousal impoverishment while creating "*surviving spouse* impoverishment." Indeed, the purpose of the program, as declared by HHS' own website, is to ensure that "community spouses are able to *live out their lives* with independence and dignity." *See* HHS website at http://hcfa.hhs.gov/medicaid/obs10.htm (emphasis added). The resource-first rule serves the overarching legislative policy behind these crucial protections, to "end spousal

impoverishment," including impoverishment of widows and widowers.

b. The Resource-First Rule Serves The Specific Remedial Purpose Of § 1396r-5(e)(2)(C).

As petitioner aptly noted, § 1396r-5(e)(2)(C) is a remedial provision of the statute. (Pet'r. Br. at 9.) As a general rule, remedial legislation is to be construed broadly, rather than narrowly, so as to give effect to its remedial purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The resource-first rule serves the remedial purpose of the statute admirably. It makes people eligible who would otherwise be ineligible: institutionalized spouses whose community spouses' income happens to be generated by savings rather than by Social Security, pensions, annuities or employment. Finally, by accelerating the time when eligibility occurs, resource-first allows the remedial post-eligibility income provisions to *actually* attach, rather than *fictionally* attach.

By contrast, the income-first rule helps no couple who would not also be helped by the resource-first rule and remedies nothing. At its best, income-first is neutral.[10] In most cases, as in the Blumers', income-first actually serves to deny eligibility – thereby requiring the couple to spend additional assets and income on nursing

[10] It is neutral in cases where the community spouse's income, even when combined with the imputed institutionalized spouse's income, is insufficient to raise the community spouse's income to the MMMNA. The resource-first rule would apply equivalently to this situation.

home care. In *no* case does the income – first rule accelerate eligibility or make someone eligible who would otherwise be ineligible. The United States frankly acknowledges the non-remedial nature of income-first: "In general, the income-first method makes it less likely that the CSRA will be increased . . . ." (U.S. Br. at 9.) Income-first is nothing more than a tool developed by the states and CMS to unfairly shift the costs of the Medicaid program from the government to the community spouse. It undercuts the specific remedial purpose for which § 1396r-5(e)(2)(C) was enacted.

c. The Hearing Under § 1396r-5(e)(2)(C) Is An Eligibility Hearing, Not An "Anticipatory Hearing."

Another argument now offered by petitioner is that the hearing contemplated by § 1396r-5(e)(2)(C) is "anticipatory." (Pet'r. Br. at 29.) Although the argument is lengthy its essence is found in one sentence: "Neither the language of § 1396r-5(b) and (c) nor the purpose of the subsection (e)(2)(C) hearing compel the conclusion that the hearing officer cannot consider potential income transfers from the community spouse." (Pet'r. Br. at 30.) This argument is nothing more than petitioner's "income-first rule is not prohibited" argument in a change of clothes. It has already been refuted. *Supra* at 19-22.

Moreover, petitioner's characterization of this hearing as "anticipatory" is plainly wrong. Petitioner would have this Court believe that a hearing under § 1396r-5(e)(2)(C) is some kind of crystal ball proceeding where a hearing examiner scrutinizes a couple's situation

and makes predictions about their future after Medicaid eligibility has been established. This characterization puts the proverbial cart before the horse.

In actuality, the hearing under § 1396r-5(e)(2)(C) is all about the *present*. It is about becoming Medicaid eligible – not at some future date, but right then and there. In order to get to the hearing the spouse or couple must apply, have a resource allowance determination made, and be denied because of excess assets. 42 U.S.C. § 1396r-5(e)(2)(A). The institutionalized spouse is appealing a negative eligibility determination with the intent of overturning it. Even if the applicant proves facts at the hearing that establish the need for a substituted resource allowance, if the couple's resources exceed the substituted amount, eligibility will be denied and the request for hearing simply dismissed. Nothing in § 1396r-5(e)(2)(C) or state practice contemplates that the applicant will be awarded a substituted or "advisory" CSRA upon which the applicant can rely at some future date. Rather, the applicant must reapply when eligibility seems likely. Another denial is issued. Another hearing is requested and another attempt to establish the couple's need for a substituted allowance is made. The hearing is not a continuation of the earlier hearing, but an entirely new proceeding.

In summary, the eligibility determination concerns whether the couple's present income and resources *without* Medicaid satisfy the relevant eligibility criteria – not whether the couple's situation *with* Medicaid would satisfy those eligibility criteria.

d. Under Resource-First Couples Pay Their "Fair Share" Before Seeking Medicaid

The resource-first rule was enacted both to end spousal impoverishment for those community spouses unlucky enough to retain title to few or none of the couples' assets and to end the unjust enrichment of those community spouses lucky enough to retain title to most or all of the couples' assets. The legislative history describes the balance sought between these two extreme situations when it states that a community spouse should be allowed to keep "a sufficient – but not excessive – amount of income and resources." H.R. REP. NO. 100-105(II) at 65, 1988 U.S.C.C.A.N. at 888. When the House Energy and Commerce Committee used the phrase "but not excessive," it was *not* in reference to a discussion or debate about the resource-first rule. Rather, it was in the context of the arbitrary enrichment of a pre-MCCA "lucky spouse." MCCA ended both the pauperization of unlucky spouses and the arbitrary enrichment of lucky ones by equalizing the treatment of all couples, regardless of how their assets happened to be titled. Congress wanted to make sure that couples who had paid nothing under the old rules were required to pay their "fair share" under the new law.

Even if the term "excessive" is applied post-MCCA, however, it is clear that resource-first does not protect an "excessive" amount of resources. Under the resource-first rule the sufficiency of the resources is measured by their ability to generate income up to the MMMNA. Resources exceeding that amount are considered "excessive" and are not protected. That "excess" is the "fair share" that

couples must expend before seeking assistance from Medicaid. The sufficiency is also limited by the amount of resources the couple actually has at the time of the Medicaid application.

Again, the Blumers' situation illustrates the point. When Irene went into the nursing home the Blumers' had $144,000 in savings. When Irene applied for Medicaid they had less than $90,000 left. Under resource-first they could preserve what remained of their assets, less than $90,000. The additional $55,000 was "excessive" and had to be spent before Irene could become eligible for Medicaid. It is difficult to understand how a couple who expends $55,000 of their savings, plus an untold amount of their income on nursing home care over two years can be portrayed as not having paid their "fair share."

Moreover, the Blumers' contribution does not end when their excess resources are exhausted. A greater amount of Irene's monthly income is available to pay to the nursing home under resource-first than would be available under income-first. Under resource-first Irene's post-eligibility allocation of income to Burnett is reduced to a mere $24.55 because the substituted CSRA makes up most of the shortfall between Burnett's monthly income and the MMMNA. This leaves over $1,200 of Irene's income to pay the nursing home. Under resource-first the Blumers continue to pay their "fair share" each and every month.

e. The Cooperative Federalism Of MCCA Allows States Flexibility To Set The MMMNA And The Standard CSRA, But Grants States No Discretion To Create New Rules For Determining Income.

It is important to note that neither petitioner nor the United States disputes that the resource-first rule is consistent with the statutory language. Instead, they assert that the language also allows states to adopt *either* resource-first or income-first, despite the fact that these different interpretations lead to radically different results. But there is no indication that Congress intended to give states such discretion in construing "community spouse's income" or to permit widely divergent standards regarding what constitutes income. Indeed, the statute's mandate that the SSI methodologies must be followed shows that Congress sought to impose uniform rules for making these determinations.

The notion that Congress meant to authorize income-first is further belied by the fact that when Congress wanted states to have discretion in eligibility determinations, it delegated that discretion explicitly. As previously discussed, Congress gave states enormous discretion in establishing the MMMNA and the standard CSRA amounts. *Supra* at 5. Congress did so explicitly and carefully by describing in great detail the floor and ceiling amounts within which States could set these amounts. By setting the MMMNA and the CSRA amounts, a state has the ability, without resorting to the tortured income-first interpretation, to both limit the resources a couple may retain and determine for itself the amount it considers

sufficient for a community spouse to maintain independence within its own borders.

Thus, even though the language of the statute precludes states from using the income-first rule to limit eligibility, states still retain ultimate control over the costs associated with these provisions. A state that sets its MMMNA at a low level will severely restrict the applicability of resource-first. Fewer resources are needed to generate a low MMMNA. The CSRA has a similar effect. By setting its standard CSRA lower a state forecloses community spouses who have high incomes from automatic resource protection. Further, a lower standard CSRA compels an applicant to go through the arduous hearing process before being allowed to preserve sufficient resources.[11] Once a state has determined for itself what amount is sufficient to maintain the independence of a community spouse, resource-first guarantees that the community spouse will receive this amount throughout life, not until the institutionalized spouse dies.

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[11] Wisconsin is an example of a state that has exercised this discretion on two occasions. In 1989 it raised its minimum CSRA. 1989 Wisconsin Act 81, §§ 1 and 2. In 1995 it lowered both its minimum CSRA and its MMMNA. 1995 Wisconsin Act 27, §§ 3003, 3005(d). Wisconsin could further reduce these two numbers if it so chose. For example Wisconsin could reduce its MMMNA by $528.75, thereby immediately restricting the applicability of resource-first to community spouses with incomes less than that amount. Had Wisconsin's MMMNA been even $100 lower in 1997 the Blumers' ability to even raise a resource-first claim would have been foreclosed.

B. EVEN IF THIS COURT FINDS § 1396r-5(e)(2)(C) TO BE AMBIGUOUS AND THEREFORE SUBJECT TO INTERPRETATION, THE ONLY REASONABLE INTERPRETATION IS RESOURCE-FIRST.

Even if this Court finds the term "community spouse's income" to be ambiguous it should affirm the decision below because Wisconsin's income-first rule is not a reasonable interpretation of that term in light of the statute's objectives, language concerning income determinations, and legislative history.

1. The Conference Committee Ultimately Adopted The Resource-First Rule, Albeit In A Different Form Than Contained In The Senate Or House Bills.

Petitioner and courts which have adopted the income-first interpretation have focused on one small part of the drafting history of MCCA to support income-first. They have seized upon the MCCA Conference Committee's decision not to adopt a Senate provision defining "excluded resources" as those necessary "to produce income that is available to the community spouse . . . up to the limits established by this section [the MMMNA]." See H.R. Conf. Rep. No. 100-661 at 263, 1988 U.S.C.C.A.N. at 1041. Income-first proponents claim that this deletion is indicative of Congress' intent to reject resource-first. *See, e.g. Cleary I*, 959 F.Supp. 222, 233; *Cleary II*, 167 F.3d 801, 811; *Chambers*, 145 F.3d 793, 804. This myopic view ignores what actually happened in the Conference Committee. A comprehensive examination of how the final statutory language in § 1396r-5(e)(2)(C) differed from the

Senate *and House* versions reveals that the Conference Committee did not reject the resource-first rule.

In addition to the language on excluded resources, the Senate version contained a provision for *additional* increases in the CSRA if the community spouse could prove financial duress. H.R. CONF. REP. NO. 100-661 at 264, 1988 U.S.C.C.A.N. at 1042. Further, the House version contained a "choice of law" provision which allowed couples to continue to use pre-MCCA rules if those rules resulted in the protection of a greater amount of resources. H.R. CONF. REP. NO. 100-661 at 260, 1988 U.S.C.C.A.N. at 1038. Thus, both Houses of Congress demonstrated their commitment to couples who were not protected by the standard CSRA determination by providing a way around it. A way involving only resources and *not* a fictional imputation of income from the institutionalized spouse. As the Conference Committee concluded, however, both chambers had accomplished their purposes awkwardly.

The Conference Committee ultimately adopted a compromise bill that accomplished two objectives. First, it eliminated provisions that would have allowed couples to exclude large pools of marital resources. Specifically, the Committee dropped the House's "choice of law" provision and thereby ensured that couples could not preserve *unlimited* amounts of resources. Similarly, the committee deleted the Senate's "resource exclusion" and thereby eliminated the possibility that some community

spouses would, in effect, receive two CSRAs.[12] *See* H.R. CONF. REP. NO. 100-661 at 264, referring to 262, 260, 1988 U.S.C.C.A.N. at 1042 referring to 1040, 1038.

Second, the Conference Committee mandated an expanded CSRA in the event that the standard CSRA was insufficient to generate income up to the MMMNA. The Committee accomplished this by replacing the Senate's "financial duress" resource protection with the provision requiring a hearing examiner to substitute a higher CSRA if the applicant seeks a fair hearing and can prove the need for a higher CSRA.

Ultimately, the compromise bill puts the burden of seeking and proving up the need for a substituted CSRA on the applicant, rather than incorporating it as a routine part of the eligibility determination process handled by the local agency.

Nothing in the legislative history indicates that either the House or the Senate also agreed to allow states to further limit the effect of the substitute CSRA by giving

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[12] The Senate, by treating income-producing resources as "excluded," had removed them from the pool of marital resources available to the couple at time of institutionalization. Apparently, the Senate did not take this into account in its section of the bill that created the standard CSRA because it calculated the standard CSRA based on unexcluded assets. The effect was that some community spouses with lower incomes, but substantial assets would have been able to retain the equivalent of *two* CSRAs – the first through the income-producing exclusion and the second through the application of the standard resource allowance. This unintended effect must certainly have been the main reason for eliminating the income-producing exclusion.

states the option of deeming some of the income of the institutionalized spouse to the community spouse. By focusing on one part of the Conference Committee actions while conveniently ignoring the rest, petitioner and the income-first courts have read far more into the legislative history of MCCA than is supported by the actual record of its enactment.

2. The Legislative History of MCCA Supports The "Resource-First" Rule.

Petitioner and several courts have focused upon the parenthetical phrase in the legislative history "(taking into account any other income attributable to the community spouse)", H.R. CONF. REP. NO. 100-661, p. 267, 1988 U.S.C.C.A.N. at 1045, and cited it as support for the income-first rule. *See, e.g., Cleary I*, 959 F.Supp. 222, 234 ("for the purposes of resource allocation . . . the community spouse monthly income allowance provided for in (d)(1)(B) is certainly 'income attributable to the community spouse' ").

In fact, that statement supports the resource-first rule. The only time the word "attribute" or its derivations is used in reference to income in § 1396r-5 is in the post-eligibility income provision. 42 U.S.C. § 1396r-5(b)(2). In that context the word "attribute" is used to require *separate* treatment of income. The Conference Committee was certainly aware of the way it used the word "attribute" in the statutory language it had just agreed to in the compromise bill. Presumably, the Committee used "attribute" consistently in the legislative history. Read that way,

the word "attribute" leads to the conclusion that Congress intended "community spouse's income" in § 1396r-5(e)(2)(C) to include only the community spouse's individual income from Social Security, pensions, employment, and other sources. The parenthetical phrase was not included in the final statutory language because Congress did not change the preexisting SSI methodology regarding attribution of income.[13]

The petitioner's misinterpretation of this phrase stems from its erroneous view that the terms "deeming" and "attribution" are "closely related concepts." (Pet'r. Br. at 7, n. 7.) Before MCCA the terms were closely related. *See Herweg v. Ray*, 455 U.S. 265, 270 (1982). Not so since MCCA. The income attribution rules in MCCA accomplish precisely the *opposite* result that deeming accomplishes. Under MCCA, attribution results in the separate treatment of a couple's income. Deeming has the effect of commingling it. It is highly unlikely that Congress meant "attribute" to mean "deem" in the legislative history of a law in which Congress was using the word "attribute" to mean the opposite of "deem." Petitioner

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[13] The *only* significant deviation in the statutory language from the legislative history language is the statute's omission of the parenthetical statement "taking into account any other income attributable to the community spouse." All other portions of that legislative history language are clearly included in the statutory language itself, including the earlier parenthetical reference to the relationship between the CSRA and the income generated by it. Thus, the significance of the phrase lies not in its presence in the legislative history, but in its absence from the statute.

and the income-first courts have plainly misread the legislative history surrounding MCCA. A proper reading of the legislative history compels resource-first.

3. No Deference Is Owed The Agency's Income-First Interpretation Because It Is Not Reasonable, Consistent, Thoughtful, Or Persuasive.

The CMS' income-first position is entitled to no deference because the statutory language itself precludes this interpretation. As discussed above, any effort to interpret the relevant language to permit a "reverse deeming" rule is inconsistent with the statutory language and mandate that income determinations be governed by the same rules used in the SSI program. Because the income-first interpretation is inconsistent with the statute, the agency's claim that it is a permissible interpretation is not entitled to deference. *Brown v. Gardner*, 513 U.S. 115, 122 (1994); *Doe v. Steelworkers*, 494 U.S. 26, 41-43 (1990).

Even if this Court believes that a gap exists, the income-first interpretation is entitled to no deference under either *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944) because an interpretation of a statute that frustrates the purpose of an Act is not reasonable, persuasive, or thoughtful. As amply demonstrated, MCCA was enacted to grant the community spouse financial independence both during the institutionalization of his or her spouse and after the death of that spouse. Congress required the resource-first rule because it was the best

method by which to guarantee this ongoing independence. The "deeming provision" in 42 U.S.C. § 1396a(a)(17) was specifically superseded by § 1396r-5(a)(1) of MCCA in order to accomplish this goal. As a result, CMS simply cannot speak with the force of law on this issue, and no *Chevron* deference is warranted. *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001).[14]

To the extent that CMS retains any policy-making authority under the "deeming provision," it is limited to a determination of what income is "available *to* the applicant or recipient." 42 U.S.C. § 1396a(a)(17)(B),(D) (emphasis added). Because 42 U.S.C. § 1396r-5(b)(1) specifically prohibits deeming to an institutional spouse the only possible authority remaining under § 1396a(a)(17) is to establish policies on deeming to *non*-institutionalized applicants or recipients.[15]

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[14] The recent regulation proposed by CMS supporting the income-first interpretation is entitled to no *Chevron* deference because it relies upon the superseded deeming provision of 42 U.S.C. § 1396a(a)(17) for policy making authority. 66 Fed. Reg. 46763 (proposed September 7, 2001) to be codified at 42 C.F.R. § 431.260.

[15] Further, if this Court finds that the Secretary retains some authority to speak with the force of law on this issue, the income-first interpretation is nonetheless impermissible because it causes applicants who would be eligible for benefits to be ineligible in violation of 42 U.S.C. § 1396a(r)(2). Section 1396a(r)(2) was necessary in the first place because the Secretary had consistently misinterpreted the applicability of SSI methodologies to Medicaid. *Supra*. at 25 n.7. Thus, contrary to United States' assertion that the "need for the Secretary's expertise is at its apogee" in this case (U.S. Br. at 21), it would actually appear that the need for that expertise is at its nadir.

The agency statements cited by petitioner as support for income-first do not reflect the reasonable, consistent, thoughtful or persuasive analysis that is necessary to justify deference under *Skidmore*. *See Mead*, 121 S.Ct. at 2172 quoting *Skidmore*, 323 U.S. at 140. Indeed, the opinion letters issued by the HCFA Chicago regional office reflect inconsistent positions and a paucity of analysis. In its first December 1993 letter, the HCFA Chicago regional office posits § 1396r-5(e) to *require* the income-first interpretation. (Pet. App. at 83a.) In the March 1994 letter, the regional office rescinds its earlier letter, stating that the first letter was based on a misplaced reliance on provisions of the HCFA State Medicaid Manual requiring the income-first interpretation. The letter describes the relied-upon section of the manual as a "derived" policy not required by the Social Security Act. The letter ultimately concludes that until regulations are promulgated, a state Medicaid plan will not be considered out of compliance with federal standards whether the state uses an income-first or a resource-first approach. (Pet. App. at 84a-86a.) The lack of consistency in the agency's position is further demonstrated by the fact that, since 1994, when the agency adopted the position that either method is permissible, the State Medicaid Manual continues to require income-first.

Finally, CMS' position is not thoughtful or persuasive. Rather, its position is a neutral, hands-off position. A careful reading of the letters relied upon by petitioner shows that the agency did not undertake any analysis of the statute itself. The letters simply reassure states that, until regulations are promulgated, states may continue under either method without fear that federal monies

would be withheld. In this case, the CMS and its predecessor, HCFA, failed to analyze the statute or address this issue for over 12 years. An agency position to postpone consideration of an issue is neither thoughtful nor persuasive.

CONCLUSION

The Court should affirm the decision of the Wisconsin Court of Appeals in all respects.

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APPENDIX

Section 42 U.S.C. § 1396a(r) provides in pertinent part:

(r) Disregarding payments for certain medical expenses by institutionalized individuals

* * *

(2)(A) The methodology to be employed in determining income and resource eligibility for individuals under subsection (a)(10)(A)(i)(III), (a)(10)(A)(i)(IV), (a)(10)(A)(i)(VI), (a)(10)(A)(i)(VII), (a)(10)(A)(ii), (a)(10)(C)(i)(III), or (f) of this section or under section 1396d(p) of this title may be less restrictive, and shall be no more restrictive, than the methodology –

(i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under subchapter XVI of this chapter, or

(ii) in the case of other groups, under the State plan most closely categorically related.

(B) For purposes of this subsection and subsection (a)(10) of this section, methodology is considered to be "no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.

Supreme Court, U.S.
FILED
SEP 7 2001

No. 00-952

In the Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER

v.

IRENE BLUMER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

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QUESTION PRESENTED

Through the Medicaid program, 42 U.S.C. 1396 *et seq.*, the federal government provides funding to the States for the provision of medical services to eligible needy persons. This case arises out of a special statutory provision, 42 U.S.C. 1396r-5 (1994 & Supp. V 1999), that establishes minimum requirements for determining the eligibility of a married individual who is institutionalized (such as in a nursing home), but who has a spouse (the "community spouse") who is not. In particular, those provisions address the allocation of income and resources between such spouses for purposes of determining the institutionalized spouse's Medicaid eligibility and the extent of medical assistance. The question presented is:

Whether, in a "fair hearing" proceeding to consider whether to raise the community spouse's resource allowance (CSRA) pursuant to 42 U.S.C. 1396r-5(e)(2)(C) in order to protect additional income-generating resources to meet the community spouse's monthly maintenance needs, Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d) (West 1997), which treats excess income of the institutionalized spouse as available to the community spouse, is consistent with the federal statute, 42 U.S.C. 1396r-5.

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In the Supreme Court of the United States

No. 00-952

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER

v.

IRENE BLUMER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Medicaid is a means-based medical care program administered by the States with federal financial assistance and subject to federal standards. This case involves the special eligibility requirements for Medicaid where one spouse resides in an institutional setting, such as a nursing home, and the other does not. At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

This case concerns the Medicaid eligibility of an applicant (the "institutionalized spouse") who lives in a nursing facility, while her husband (the "community spouse") does not. In such circumstances, Medicaid protects a certain portion of the couple's resources for the benefit of the community spouse and seeks to ensure that the community spouse has sufficient income to meet his monthly maintenance needs, without rendering the institutionalized spouse ineligible for Medicaid. The federal Medicaid statute establishes a special "fair hearing" procedure in which a State may consider whether to increase the amount of resources the statute

protects for the benefit of the community spouse if such an increase is necessary to generate additional income to meet the community spouse's monthly maintenance needs.

The question in this case is whether, in determining whether to increase the amount of protected resources, a State may first consider whether the institutionalized spouse could transfer income to the community spouse and thereby bring his income up to the level set by statute to meet his monthly needs, making it unnecessary to protect additional resources. Under one calculation method, known as "income-first," States may consider such potential income transfers. Under another method, known as "resources-first," they may not. The Wisconsin Court of Appeals held that the Medicaid statute bars States from using the income-first method, notwithstanding the consistent position of the Secretary of Health and Human Services that the Medicaid statute permits that method.

1. The Medicaid program, established in 1965 as Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343, as amended 42 U.S.C. 1396 *et seq.*, "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Under the program, "[e]ach participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance.'" *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981) (quoting 42 U.S.C. 1396a(a)(17)). State standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B); see *Gray Panthers*, 453 U.S. at 42-43.

The income and resource calculations necessary to make eligibility determinations for married couples have proven to be a matter of great complexity. When Congress established the Medicaid program, Congress found it "proper to expect

spouses to support each other." *Gray Panthers*, 453 U.S. at 45 (quoting S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, 78 (1965)). Consistent with that judgment, "States adopted plans that considered the spouse's income in determining Medicaid eligibility and benefits." *Id.* at 37. States thus calculated the amount they "considered necessary to pay the basic living expenses of" the non-applicant spouse "and 'deemed' any of the spouse's remaining income to be 'available' to the applicant." *Id.* at 38. In *Gray Panthers*, this Court concluded that such an approach is consistent with the text of the Social Security Act, the Act's legislative history, and the Secretary's regulations. *Id.* at 44-48.

Before 1989, an individual in a nursing home (the "institutionalized spouse") with a spouse living in the community (the "community spouse") was often ineligible for Medicaid until the institutionalized spouse exhausted resources that were in her own name or were jointly held, without regard to the needs of the community spouse. Moreover, even when the institutionalized spouse became eligible for Medicaid, much of her income would be used to reduce the amount that Medicaid would pay for her institutional care, leaving the community spouse with little means of support if he had insufficient income of his own; States often reserved only $250 to $350 per month—sometimes less—of the institutionalized spouse's income for the benefit of the community spouse. See H.R. Rep. No. 105, 100th Cong., 1st Sess., Pt. 2, 68 (1987) (listing States). See also H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 258 (1988).[1] The net effect of those

[1] In the program's early years, some States apparently treated much of the community spouse's income as available to pay for the care of the institutionalized spouse, even if the community spouse's income was modest. In 1974, the Secretary promulgated regulations that placed time limits on the extent to which so-called "SSI States" (see H.R. Rep. No. 105, Pt. 2, at 65-66) could deem the community spouse's income to be available to the institutionalized spouse after the spouses no longer lived together. See *Herweg* v. *Ray*, 455 U.S. 265, 269-270 (1982). Under those regulations, SSI States generally had to disregard the community spouse's

requirements was the "pauperization" of many community spouses. H.R. Rep. No. 105, Pt. 2, at 65.

Congress sought to alleviate that hardship and close potential loopholes when it enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, Tit. III, § 303(a)(1)(B), 102 Stat. 754. See 42 U.S.C. 1396r-5 (1994 & Supp. V 1999). In particular, Congress "attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 798 (6th Cir.), cert. denied, 525 U.S. 964 (1998). See H.R. Rep. No. 105, Pt. 2, at 65 (bill seeks to "end th[e] pauperization" of the community spouse "by assuring that the community spouse has a sufficient—but not excessive—amount of income and resources available"). That balance is achieved through a complex set of minimum requirements for allocating income and resources between community and institutionalized spouses.

a. *Income.* The MCCA separately addresses income allocation for initial Medicaid *eligibility* determinations and for post-eligibility determinations regarding the *extent* of assistance to be furnished to persons who have already been found eligible.

For initial eligibility determinations, the MCCA imposes a single restriction regarding the attribution of income: "During any month in which an institutionalized spouse is in the

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income in determining the institutionalized spouse's eligibility in the first month following the month in which the spouses stopped living together; if both spouses were Medicaid eligible, the community spouse's income had to be disregarded after six months. See *Gray Panthers*, 453 U.S. at 39-40 (citing 42 C.F.R. 435.723(d) (1980)). So-called "Section 209(b)" States (see H.R. Rep. No. 105, Pt. 2, at 66), however, could treat the community spouse's income as available to the institutionalized spouse, after the two ceased living together, to the extent the State did so on January 1, 1972. *Id.* at 40.

institution, * * * no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(b)(1). Thus, subsection (b)(1) establishes a special rule that protects the *income of the community spouse* by excluding that income from consideration by the State when determining whether the institutionalized spouse is eligible for Medicaid. Subsection (b)(1), however, does not address whether, when States initially determine the eligibility of the institutionalized spouse, the institutionalized spouse's income may be considered to be available to the community spouse for purposes of deciding whether the latter will have sufficient income and resources to meet his monthly maintenance needs.

With respect to post-eligibility determinations regarding the extent of assistance, the MCCA provides more explicit guidance. For example, subsection (b)(2) provides that, if payment of income is made solely in the name of one spouse, that income is generally treated as available only to the named spouse. 42 U.S.C. 1396r-5(b)(2). That requirement is called the "name-on-the-check" rule. Subsection (d) in turn provides a number of exceptions to that rule to ensure that the community spouse has sufficient income to meet his basic monthly needs. Among other things, it establishes a "minimum monthly maintenance needs allowance" or "MMMNA." 42 U.S.C. 1396r-5(d)(3). The MMMNA for a community spouse is relatively generous: Although the MMMNA supports only the community spouse while the other spouse is in an institution, it is set at 150% of the poverty line for a *couple*, plus an "excess shelter allowance" that reflects certain housing expenses to the extent they consume more than 30% of the 150% figure. 42 U.S.C. 1396r-5(d)(3) and (4).

If the income of the community spouse (as determined under 42 U.S.C. 1396r-5(b)(2)) is less than the MMMNA, the amount of the shortfall is "deducted" from the income of the institutionalized spouse—reducing the amount of income that would otherwise be considered available for the institutional-

ized spouse's care—so long as that income is actually available to the community spouse. 42 U.S.C. 1396r-5(d)(1)(B) and (2). The amount of that deduction is the "community spouse monthly income allowance." *Ibid.* The MCCA thus prevents money the community spouse receives from the institutionalized spouse to meet his needs from also being considered available for the care of the institutionalized spouse; it thereby permits Medicaid to defray a greater portion of the costs of institutionalized care than it otherwise would.[2]

b. *Resources.* The MCCA provides extensive rules regarding the attribution of resources (*e.g.*, assets). First, assets such as the family home, an automobile, and certain other forms of personal property are excluded from the definition of "resources" and thus are exempt from resource limits. See 42 U.S.C. 1396r-5(c)(5), 1382b(a) and (b).

For initial eligibility determinations, the total of all of the couple's resources (whether owned jointly or separately) is calculated as of the beginning of the institutionalized spouse's first period of institutionalization. One half of that total (the "spousal share") is allocated to each spouse. 42 U.S.C. 1396r-5(c)(1)(A). Nevertheless, as a general rule, all of the resources owned jointly by the couple or by either spouse separately are considered available for the care of the institutionalized spouse, 42 U.S.C. 1396r-5(c)(2)(A), *but only to the extent* the value of those resources exceeds the amount protected under a special formula in Section 1396r-5(f)(2)(A). See 42 U.S.C. 1396r-5(c)(2)(B). By carving out that exception, the MCCA limits the extent to which the couple's resources must be exhausted before the institutionalized spouse becomes Medicaid eligible, and protects those resources for the benefit of the community spouse. The amount protected under Section 1396r-5(f)(2)(A) is the greatest of: (i) $12,000

[2] The State also must exclude a personal needs allowance, a family allowance for certain family members residing with the community spouse, and expenses incurred by the institutionalized spouse for (non-covered) medical or remedial care. 42 U.S.C. 1396r-5(d)(1)(A), (C) and (D).

or a State standard up to $60,000, indexed for inflation under subsection (g) (for 2001, the indexed ceiling amount is $87,000); (ii) the lesser of the spousal share (computed under subsection (c)(1)) or $60,000, indexed for inflation (now $87,000); (iii) the amount set at a "fair hearing" under 42 U.S.C. 1396r-5(e)(2) (see pp. 7-9, *infra*); or (iv) the amount transferred pursuant to a court order. 42 U.S.C. 1396r-5(f)(2)(A). If the portion of the couple's resources available to the community spouse is less than the protected amount under subsection (f)(2)(A), the institutionalized spouse may transfer the difference—known as the "community spouse resource allowance" or "CSRA"—to the community spouse. See 42 U.S.C. 1396r-5(f)(1) and (2).

Once the institutionalized spouse is determined to be eligible, the resources of the community spouse are not considered in making post-eligibility determinations. 42 U.S.C. 1396r-5(c)(4).

c. *The "fair hearing" requirement and the income-first and resources-first methods.* Section 1396r-5(e) provides a mechanism through which an institutionalized or community spouse may challenge in a "fair hearing" the State's determination of any of a number of elements in the statutory formulae governing eligibility for or the extent of medical assistance, including the community spouse monthly income allowance and the CSRA. 42 U.S.C. 1396r-5(e)(2)(A). This case involves Section 1396r-5(e)(2)(C), which addresses the circumstances under which a State must replace the CSRA with a different sum—in effect, increasing the CSRA—during the "fair hearing."[3]

Section 1396r-5(e)(2)(C) provides in relevant part:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of

[3] Both the government and the courts have spoken of "increasing" or "raising" the CSRA. Technically, the statute provides for another allowance to be "substituted" for the CSRA. 42 U.S.C. 1396r-5(e)(2)(C). The difference in terminology is not material.

> income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance * * * , an amount adequate to provide such a minimum monthly maintenance needs allowance.

In essence, Section 1396r-5(e)(2)(C) requires a comparison between the income available to the community spouse, including any income generated by resources protected under subsection (f)(2)(A) for the benefit of the community spouse, with the "minimum monthly maintenance needs allowance" or MMMNA. If the former is less than the latter, the CSRA may be increased.[4] Permitting the community spouse to retain (or obtain from the institutionalized spouse) additional income-generating resources helps enable the community spouse's total income to meet the MMMNA. Absent an adjustment under subsection (e)(2)(C), those additional resources would be considered available to the institutionalized spouse in determining her Medicaid eligibility, and might have to be exhausted before the institutionalized spouse could become eligible.

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[4] Although Section 1396r-5(e)(2)(C) speaks of replacing the "community spouse resource allowance," the CSRA technically is only one component of the total amount of resources protected under the MCCA. The MCCA defines the CSRA as the *difference* between the sums that can be protected (*e.g.*, $60,000, adjusted for inflation) and "the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance)." 42 U.S.C. 1396r-5(f)(2)(A) and (B). At the same time, however, the statute sometimes treats the phrase "community spouse resource allowance" as a short-hand term for the total amount of protected resources under 42 U.S.C. 1396r-5(f)(2)(A). Accordingly, although Section 1396r-5(e)(2)(C) itself speaks in terms of increasing the CSRA, the Secretary has interpreted Section 1396r-5(e)(2)(C) as authorizing an increase in the resources protected by subsection (f)(2)(A). See Pet. App. 80a. That treatment comports with 42 U.S.C. 1396r-5(f)(2)(A)(iii), which provides that the total amount of resources that may be protected for a community spouse may be set at a fair hearing.

The issue in this case is what income a State may regard as available to the community spouse when determining whether to increase the CSRA under Section 1396r-5(e)(2)(C). There are two basic approaches. Under the "income-first" method, income of the institutionalized spouse that could be made available to support the community spouse is allocated to the community spouse for purposes of determining whether the community spouse has sufficient income to meet the MMMNA. The CSRA is not increased unless the community spouse's income will not meet the MMMNA *after* taking into account any income that may be made available from the institutionalized spouse. In contrast, under the "resources-first" approach, the CSRA is increased to the extent necessary to ensure that the community spouse's total income meets the MMMNA *without* first considering the extent to which income from the institutionalized spouse could be made available to the community spouse. In general, the income-first method makes it less likely that the CSRA will be increased; it thus tends to require couples to expend additional resources before the institutionalized spouse becomes Medicaid eligible.

The Department of Health and Human Services (HHS) has stated in memoranda and letters that 42 U.S.C. 1396r-5(e)(2)(C) authorizes consideration of potential income transfers from the institutionalized spouse to the community spouse, so that States may adopt the income-first method. See Pet. App. 81a-90a (reproducing letters and memoranda); see also 66 Fed. Reg. 46,763, 46,765 (2001) (App., *infra*, 25a, 32a) (Secretary has in the past "permitted States to employ income-first or other reasonable methodologies"). On September 7, 2001, the Secretary issued a Notice of Proposed Rulemaking proposing regulations that would codify the Secretary's policy of permitting States to use either methodology as a "reasonable" state-promulgated "standard[] * * * for determining eligibility for * * * medical assistance" under 42 U.S.C. 1396a(a)(17). See 66 Fed. Reg. at 46,765, 46,766

(App., *infra*, 32a, 37a). The State of Wisconsin has, by statute, adopted the income-first method. Wis. Stat. Ann. § 49.455(8)(d) (West 1997); Pet. App. 76a. A majority of other States have also adopted the income-first method. See U.S. Amicus Br. Pet. Stage at 11 n.4.

2. Respondent Irene Blumer was admitted to a nursing facility in 1994 and applied for Medicaid through her husband, Burnett Blumer, in 1996. The Green County Department of Human Resources concluded that, as of respondent's institutionalization in 1994, the couple had $145,644 in resources. The County calculated the amount of the couple's resources that could be protected for Mr. Blumer to be half the couple's resources, $72,822. See Pet. App. 28a; see also 42 U.S.C. 1396r-5(f)(2)(A)(ii) (one measure of protected amount is lesser of spousal share or $60,000, as adjusted for inflation). Respondent, as the institutionalized spouse, was permitted to retain only $2000 in resources. The County determined that, as of the date of respondent's application for Medicaid in 1996, the couple's assets totaled $89,335. That was approximately $14,500 above the resource eligibility threshold of $74,822 ($72,822 for Mr. Blumer and $2000 for respondent). Pet. App. 24a-25a; see also *id.* at 2a.

Respondent sought a fair hearing pursuant to 42 U.S.C. 1396r-5(e)(2)(C). The hearing examiner concluded that, if respondent's income (the income of the institutionalized spouse) were excluded from consideration, Mr. Blumer's total monthly income would be $1702.45, approximately $25 less than the MMMNA of $1727. Pet. App. 25a, 30a; see also *id.* at 2a-3a. Accordingly, respondent argued that, under 42 U.S.C. 1396r-5(e)(2)(C), the CSRA should be raised to generate $25 per month in additional income for Mr. Blumer. Pet. App. 3a.

The hearing examiner concluded that respondent had monthly income of $1262.71, and that the couple's combined income therefore exceeded $2900 per month. Pet. App. 30a-31a. Using the income-first method required by Wisconsin law and permitted by HHS guidance, the hearing examiner

found that Mr. Blumer's income could be raised to the MMMNA level by allocating $25 per month to him from the income of respondent. *Id.* at 31a; see also *id.* at 3a. Accordingly, the hearing examiner declined to increase the CSRA. *Id.* at 31a-32a. The effect of the decision was to defer respondent's eligibility for Medicaid until the $14,500 in excess resources were exhausted (on, for example, respondent's care or Mr. Blumer's needs).

3. Respondent appealed, and the Green County Circuit Court affirmed. Pet. App. 19a-22a. The Wisconsin Court of Appeals, however, reversed. *Id.* at 1a-17a. In that court's view, Section 1396r-5(e)(2)(C) unambiguously mandates the resources-first method, *i.e.*, that the CSRA be adjusted upward to generate additional income to help Mr. Blumer meet the MMMNA, without considering whether respondent, his institutionalized spouse, could make income available to him. *Id.* at 11a. The Wisconsin Supreme Court denied the State's petition for discretionary review. *Id.* at 18a.

SUMMARY OF ARGUMENT

States participating in the Medicaid program must establish "reasonable standards * * * for determining eligibility for and the extent of medical assistance." 42 U.S.C. 1396a(a)(17). This case concerns whether Wisconsin's method for determining Medicaid eligibility is permissible in light of the MCCA, 42 U.S.C. 1396r-5. Under 42 U.S.C. 1396r-5(e)(2)(C), a state examiner conducting a "fair hearing" may increase the community spouse resource allowance (CSRA) if the income generated by the CSRA otherwise would be "inadequate" to raise the community spouse's income to the minimum monthly maintenance needs allowance (MMMNA) set by statute. The Secretary has determined that States, in deciding whether to increase the CSRA, may count as part of the community spouse's income any income the institutionalized spouse could make available to the community spouse. That method is known as "income first."

A. The Medicaid program permits use of the income-first method. When Congress established the Medicaid program, it incorporated the background principle that spouses are responsible for each others' care. *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). The MCCA establishes a limited exception by precluding income of the community spouse from being treated as available to the institutionalized spouse. 42 U.S.C. 1396r-5(b)(1). On the other hand, the MCCA nowhere prohibits income of the institutionalized spouse from being considered available to the community spouse when determining eligibility, as occurs under the income-first method invalidated by the Wisconsin court. The fact that Congress did not specifically prohibit that practice is strong evidence that the MCAA allows States to utilize it, and thus to adhere to the background principle that spouses may be expected to support each other. The legislative history of the MCCA also supports that conclusion, as does the Secretary's longstanding construction of the Act.

B. In rejecting that interpretation, the Wisconsin Court of Appeals relied on the fact that Congress expressly provided for States, in post-eligibility determinations regarding the extent of assistance, to account for transfers of income made by the institutionalized spouse to help the community spouse achieve the MMMNA, 42 U.S.C. 1396r-5(d)(1)(B) and (2), but that Congress did not include that requirement for initial eligibility determinations. The fact that the MCCA specifically *accommodates* transfers of income from the institutionalized spouse to the community spouse to bring the community spouse's income up to the MMMNA for post-eligibility purposes, however, underscores the reasonableness of taking the possibility of such transfers into account when calculating the income available to the community spouse pre-eligibility. Moreover, almost all of the MCCA's income-attribution rules are mandatory only for "post-eligibility income determination[s]" regarding the extent of assistance. 42 U.S.C. 1396r-5(b)(2) and (d). Under the court

of appeals' approach, Congress's failure to require States to use those income-attribution rules for initial eligibility determinations would bar the States from adapting them for that purpose. Yet the resources-first methodology preferred by the Wisconsin Court of Appeals itself borrows some of those post-eligibility rules for purposes of making initial eligibility determinations.

The Wisconsin Court of Appeals also expressed concern that the income-first method might leave a community spouse with less income than he needs (or than the MMMNA provides) after the death of the institutionalized spouse. In most benefits and pension contexts, however, the surviving community spouse would be entitled to receive a significant portion of the payments that would otherwise have gone to the institutionalized spouse during her life. Moreover, the institutionalized spouse's death eliminates the costs of her care—costs that previously absorbed much of her income. Consequently, the net effect following the institutionalized spouse's death may often be an *increase* in the income available to the community spouse. The MMMNA, in any event, is not the proper measure of the community spouse's needs after the institutionalized spouse's death, since it is set at a level appropriate to a *couple*. Finally, the court of appeals ignored the fact that increasing the resources protected for the community spouse necessarily diverts scarce Medicaid funds from potentially needier persons in order to benefit potentially wealthier community spouses.

ARGUMENT

THE SOCIAL SECURITY ACT PERMITS CONSIDERATION OF INCOME AVAILABLE FROM AN INSTITUTIONALIZED SPOUSE WHEN DETERMINING WHETHER THE COMMUNITY SPOUSE RESOURCE ALLOWANCE SHOULD BE INCREASED

In establishing the Medicaid program, Congress focused principally on assisting those "persons who were most im-

poverished." *Schweiker* v. *Hogan*, 457 U.S. 569, 590 (1982). Under the program, "[e]ach participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance,'" and an "individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36-37 (1981) (quoting 42 U.S.C. 1396a(a)(17)). State standards may "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B); *Gray Panthers*, 453 U.S. at 42-43.

This case concerns whether the standards established by the State of Wisconsin are consistent with requirements added by the Medicare Catastrophic Coverage Act of 1988 (MCCA). The fundamental difference between the two approaches at issue—income-first and resources-first—is whether potential income transfers to the community spouse from the institutionalized spouse may be taken into account when deciding whether to increase the community spouse resource allowance (CSRA). Rejecting the views of the Secretary, Pet. App. 81a-91a, two federal courts of appeals, *Cleary* v. *Waldman*, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998), and the highest courts of two States, *Golf* v. *New York State Dep't of Soc. Servs.*, 697 N.E.2d 555 (N.Y. 1998); *Thomas* v. *Commissioner of the Div. of Med. Assistance*, 682 N.E.2d 874 (Mass. 1997), the Wisconsin Court of Appeals held that the MCCA prohibits the income-first method used by most States, under which such potential income transfers are considered. Instead, that court held, the MCCA unambiguously requires use of the resources-first method. In so holding, the court of appeals misconstrued the Act, inappropriately substituted its own views for the reasoned and consistent approach of the federal agency to which Congress entrusted

the statute for administration, and usurped the discretion that Congress afforded the States in this program of cooperative federalism.

A. The Text, Structure, History, And Administrative Interpretation Of The MCCA Establish That States May Use The Income-First Methodology

1. In enacting the Medicaid program, Congress proceeded on the premise that "it is proper to expect spouses to support each other." S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, 78 (1965); see also H.R. Rep. No. 213, 89th Cong., 1st Sess. 68 (1965). Thus, Congress prohibited States from "tak[ing] into account the financial responsibility of any individual for any applicant * * * *unless* such applicant or recipient is such individual's spouse" or minor child. 42 U.S.C. 1396a(a)(17)(D) (emphasis added). In view of that statutory text, the Secretary and the States for decades deemed each spouse's income and resources to be available for the care of the other, whether or not they were actually furnished, subject to such regulatory restrictions as might be adopted by the Secretary. See pp. 2-4 & note 1, *supra*. Upholding that construction in *Gray Panthers*, this Court concluded that "Congress treated spouses differently from most other relatives by explicitly authorizing state plans to 'take into account the financial responsibility' of the spouse." 453 U.S. at 47 (quoting 42 U.S.C. 1396a(a)(17)(D)).

In enacting the MCCA in 1988, Congress modified that general rule in part. The MCCA provides that, "[d]uring any month in which an institutionalized spouse is in the institution, * * * no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(b)(1). The MCCA thus forbids the community spouse's income, even if potentially transferrable, from being deemed available to the institutionalized spouse. But it nowhere precludes the Secretary or the States from treating excess income of the *institutionalized spouse* as available to

the *community spouse* in making initial eligibility determinations, as occurs under the income-first method. The most natural inference to be drawn from that omission is that Congress did not intend to preclude States from treating the income of institutionalized spouses as available to provide financial support for community spouses where that is necessary to raise the income of the community spouse to the minimum monthly maintenance needs allowance (MMMNA). See 66 Fed. Reg. at 46,766 (App., *infra*, 34a) (Secretary's conclusion that omission "supports an inference that it is permissible to consider all or some portion of the institutionalized spouse's income to be available to the community spouse"). The soundness of treating excess income of the institutionalized spouse as available for maintaining the household used by the community spouse is reinforced by the fact that the MMMNA is set at 150% of the poverty level for a *couple*. See 42 U.S.C. 1396r-5(d)(3).

Moreover, when Congress revisited the general subject of spousal attribution in 1988 and adopted the specific income-attribution rules in the MCCA, it acted against a background that included not merely a longstanding agency construction and settled state practices of presuming or requiring spouses to support each other (subject only to certain limits set by the Secretary, see pp. 2-4 & note 1, *supra*), but also express statutory support for that approach and this Court's decisions in *Gray Panthers* and *Herweg* v. *Ray*, 455 U.S. 265 (1982), upholding it. Cf. *United States* v. *Wells*, 519 U.S. 482, 495 (1997); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). These circumstances make all the more compelling the conclusion that Congress's enactment of a specific prohibition against deeming the community spouse's income to be available to the institutionalized spouse, and its failure to adopt any reciprocal prohibition against considering the institutionalized spouse's income as available to the community spouse, leaves the States free to apply the background principle of spousal support when deciding whether to protect

additional resources for the community spouse. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986); *Haig* v. *Agee*, 453 U.S. 280, 297-298 & n.37 (1981).

Indeed, for post-eligibility determinations regarding the extent of assistance, Congress expressly provided for the income of the institutionalized spouse to be used to support the community spouse. See 42 U.S.C. 1396r-5(d)(1)(C) and (2) (where community spouse's income is less than MMMNA, difference is deducted from institutionalized spouse's income for post-eligibility purposes, to the extent such amount is actually made available to the community spouse). It follows that a state standard that anticipates such transfers for eligibility purposes (when deciding whether to protect additional resources) is at least a "*reasonable* standard[] * * * for determining [Medicaid] eligibility," 42 U.S.C. 1396a(a)(17) (emphasis added). Compare *Mourning* v. *Family Pubs. Serv., Inc.*, 411 U.S. 356, 372-373 (1973). In determining whether to increase the CSRA in a fair hearing under subsection (e)(2)(C)—where the task is to determine whether the community spouse has sufficient income to meet his needs—the State must determine what income is available to support the community spouse. It would be perverse to construe Section 1396r-5 to require the hearing officer to ignore the income of the institutionalized spouse in making that determination when another provision of the same enactment expressly contemplates that some portion of the institutionalized spouse's income may be made available to the community spouse for that very purpose.

The structure of the MCCA as a whole, in fact, suggests that transfers from institutionalized spouses to community spouses are the ordinary method of bringing the community spouse's income up to the MMMNA. Congress provided an express and precise formula that can be used to account for such transfers for post-eligibility purposes without resort to a hearing. 42 U.S.C. 1396r-5(d)(1)(B) and (d)(2). In addition, Congress provided a precise formula for determining the ex-

tent resources may be protected through the CSRA. 42 U.S.C. 1396r-5(f)(2). In contrast, increases in the community spouse's income through an adjustment to the CSRA can be achieved only by invoking an exception to the statutory CSRA formula; the exception requires use of a hearing process; and the amount of any increase is not governed by a precise formula. It can be inferred from this structure that Congress anticipated that the community spouse ordinarily would "have his or her resources and income protected in the manner dictated by" the MCCA's "precise and detailed formula[e]," and that departure from the statutory CSRA through "fair hearings" would occur only where those formulae cannot "provide the protection that Congress contemplated." See Pet. App. 81a (1993 HCFA memorandum).

2. The legislative history supports the conclusion that the income-first method is permissible. Addressing the very provision at issue here, the Conference Report declares:

> If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance *(taking into account any other income attributable to the community spouse)*, notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 265 (1988) (emphasis added); see also *id.* at 267 (similar). The Conference Report thus demonstrates that Congress understood that there might be "other income attributable to the community spouse" that a State may consider when determining whether to raise the CSRA.

3. Consistent with the foregoing analysis, the Secretary has long interpreted the MCCA as permitting States, in establishing "reasonable standards * * * for determining eligibility," 42 U.S.C. 1396a(a)(17), to take into account income of an institutionalized spouse that may be made

available to the community spouse when deciding whether to increase the CSRA. In 1993, the Health Care Financing Administration (HCFA)—now known as the Centers for Medicare and Medicaid Services (CMS)—advised States that they may require "that the institutionalized spouse * * * first make available the maximum amount of income he or she can as a community spouse monthly income allowance * * * before being allowed to raise the [CSRA]," and that States "have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse." Pet. App. 81a; see also Pet. App. 86a (Mar. 1994) ("States have the option to use the 'income first' rule or to apply some other reasonable" methodology); Pet. App. 89a (July 1994) (same); Pet. App. 90a (Mar. 1996) (Letter from Secretary Shalala stating that Ohio's income-first policy is "legally permissible").

As the Secretary recently explained in proposing a regulation to formally codify that rule:

> We have previously issued policy memoranda and letters expressing our view that [42 U.S.C. 1396r-5(e)(2)(C)] authorizes a State to consider potential income transfers from an institutionalized spouse to a community spouse, so that a State may adopt the income-first method or apply some other reasonable methodology * * *. In other words, consistent with the statutory requirement that State[s] utilize "reasonable standards" for determining eligibility and the amount of benefits as described in [42 U.S.C. 1396a](a)(17), we have permitted States to employ income-first or other reasonable methodologies.

66 Fed. Reg. at 46,765 (App., *infra*, 31a-32a). Indeed, a provision of the State Medicaid Manual—issued days after the MCCA provisions became effective—explains that, in deciding whether to substitute another amount for (*i.e.*, increase) the CSRA, "[t]here are no substitutions when institutionalized spouses do not make available monthly income

allowances to community spouses." State Medicaid Manual § 3262.3 (Oct. 1989) (*available at* http://www.hcfa.gov/pubforms/pub45pdf/sm3260.pdf)[5]; see also Pet. App. 85a-86a, 88a (HCFA memoranda discussing Manual § 3262.3).

In construing an Act of Congress entrusted to an agency for administration, courts must give respectful consideration to the views of the agency when, as here, Congress has not itself "directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (remanding court of appeals decision made without any regard to agency's letter ruling). This Court, in fact, has accorded *Chevron*-like deference to the Secretary's view on issues like this one, even when that view is expressed in informal memoranda and letters. In *Lukhard* v. *Reed*, 481 U.S. 368 (1987), a majority of this Court agreed that the Secretary's view—there, that the Social Security Act permits but does not require States to treat tort awards as income when determining eligibility—"is entitled to deference," even though that view was expressed only in letters and memoranda. *Id.* at 378 (plurality); *id.* at 383 (Blackmun, J., concurring) (emphasizing deference). See also *Mead*, 121 S. Ct. at 2176 & n.17 (identifying cases in which agency views expressed in informal or non-binding formats were not given "*Chevron*-style" deference); *Christensen* v. *Harris County*, 529 U.S. 576, 586 (2000).

In any event, considering "the degree of the agency's care, its consistency, formality, and relative expertness, and * * * the persuasiveness of [its] position," there can be little doubt that the agency's longstanding views are entitled to substantial weight here. *Mead*, 121 S. Ct. at 2171. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). The Secretary's views have been consistent. See 66 Fed. Reg. at 46,765 (App., *infra*, 31a-32a); Pet. App. 81a-90a. Respect is "[p]articularly * * * due when," as here, "the administrative practice at stake 'involves a contemporaneous construction of a statute.'" *Udall*, 380 U.S. at 16 (quoting *Power Reactor Dev. Co.* v. *International Union of Elec.*, 367 U.S. 396, 408 (1961)). And, in light of the extreme complexity of the Act's interlocking provisions, the need for the Secretary's expertise is at its apogee. See *Hogan*, 457 U.S. at 571; *Alcoa* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984).

[5] The Manual provision is dated "10-89." The relevant provisions of the MCCA apply only where a spouse has been continuously institutionalized on or after September 30, 1989. Pub. L. No. 100-360, § 303(g)(1)(B), 102 Stat. 763.

B. The Wisconsin Court Of Appeals' Reasons For Rejecting the Secretary's Construction Are Unpersuasive

1. The Wisconsin Court of Appeals' primary reason for rejecting the Secretary's conclusion that the MCCA allows States to use the income-first approach was its view that the MCCA unambiguously forbids consideration of potential income transfers from the institutionalized spouse to the community spouse when deciding whether to raise the CSRA. To support that view, the court of appeals relied on the fact that Section 1396r-5(e)(2)(C) "very specifically directs the increase" of the CSRA "to an amount sufficient to generate additional income to meet" the MMMNA. Pet. App. 11a. That observation, however, merely begs the question in this case. In deciding whether the unadjusted CSRA "is inadequate * * * to raise the community spouse's income" to the MMMNA for purposes of Section 1396r-5(e)(2)(C), the State necessarily must calculate "the community spouse's income." The MCCA does not define the phrase "community spouse's income," and it provides no rules regarding which potential income sources may be counted in determining that income's adequacy. In particular, subsection (e)(2)(C) does not address whether, in determining the adequacy of the community spouse's income, it is permissible to consider poten-

tial income transfers *from the institutionalized spouse* to the community spouse. Contrast 42 U.S.C. 1396r-5(b)(1) (barring consideration of community spouse income as available to the institutionalized spouse); pp. 15-17, *supra*. As one court has explained, the view adopted by the Wisconsin Court of Appeals fails to confront the question whether "a community spouse's 'income' includes—or does not include—any transfer of income from the institutionalized spouse." *Chambers*, 145 F.3d at 799. Whether such potentially "transferred income is included" is what distinguishes between "the two possible approaches" (income-first and resources-first) "used to implement subsection (e)(2)(C)." *Ibid.*

On that issue, the MCCA is silent. *Chambers*, 145 F.3d at 802. In this context, that silence is fatal to the Wisconsin court's analysis. In the MCCA, Congress included a provision declaring that, "*[e]xcept* as [Section 1396r-5] *specifically* provides," the MCCA "does not apply to" a "determination of what constitutes income or resources" or "the methodology and standards for determining and evaluating income and resources." 42 U.S.C. 1396r-5(a)(3) (emphasis added). Section 1396r-5 nowhere "provides" that income from the institutionalized spouse may not "constitute[] income" of the community spouse when deciding whether to raise the CSRA, and it certainly does not do so "specifically."

2. The Wisconsin Court of Appeals also relied on the fact that the adjustment to the CSRA is a *pre*-eligibility determination. Pet. App. 12a-13a. For *post*-eligibility determinations, the court observed, the MCCA provides specific rules. Under one such rule, if "the amount of monthly income otherwise available to the community spouse" is less than the MMMNA—and if the institutionalized spouse makes the difference available to the community spouse—that amount (the "community spouse monthly income allowance") "shall be deducted from the [institutionalized] spouse's monthly income" in determining the extent of assistance furnished to the institutionalized spouse. 42 U.S.C. 1396r-5(d)(1)(B) and

(2). The court read those provisions as "direct[ing] the institutionalized spouse to transfer income to the community spouse if the community spouse's income falls short of the MMMNA." Pet. App. 12a. Noting that Congress did not specifically provide for such a transfer in the case of initial eligibility determinations, the court inferred that such attribution is prohibited in that setting. It reasoned: "Because § 1396r-5(d) (relating to transferring income) is limited to post-eligibility determination transfers, * * * then increasing the CSRA via resources is the only method by which a community spouse can be afforded more income for the MMMNA at the time [Medicaid] eligibility is being determined for the institutionalized spouse." *Id.* at 13a.

The court of appeals proceeded from an erroneous premise. Subsection (d)(1)(B) does not itself direct the institutionalized spouse to transfer income to the community spouse, and it does not address the question of whether a State may require the institutionalized spouse to do so. Rather, it provides that, *if* the community spouse's income is less than the MMMNA, and *if* the difference (the community spouse income allowance) *is* transferred to the community spouse, then that amount is deducted from the *institutionalized spouse's* income for purposes of determining the extent of assistance the institutionalized spouse will receive. That provision in no way demonstrates that Congress intended to bar a State from treating a portion of the institutionalized spouse's income as available to the community spouse for purposes of determining whether the *community spouse's* income meets or exceeds the MMMNA. To the contrary, the very fact that Congress fashioned special rules accommodating the transfer of such income to the community spouse when the transfer actually occurs post-eligibility strongly reinforces the conclusion that a State may regard such income as available to the community spouse in determining, at the initial eligibility stage, whether the income available to the community spouse falls short of the MMMNA (and,

accordingly, whether an increase in the CSRA is called for). Indeed, while the Wisconsin Court of Appeals posited (Pet. App. 11a) that Congress demonstrated an intent to prohibit imputing the institutionalized spouse's income to the community spouse when deciding whether to raise the CSRA by failing to include "direct or specific language" stating that such "imputation * * * should occur," the legislative history shows the opposite to be true. As pointed out above (p. 18, *supra*), the Conference Report expressly contemplates that there might be "other income attributable to the community spouse" that can be considered when determining whether to increase the CSRA.

The court of appeals' reasoning also proves too much, because Congress did not make *any* of the extensive income-attribution rules—except the prohibition on attributing *community spouse* income *to* the *institutionalized spouse*, 42 U.S.C. 1396r-5(b)(1)—applicable to initial eligibility determinations. See 42 U.S.C. 1396r-5(b)(2) (providing rules for "[a]ttribution of income" for "purposes of the post-eligibility income determination"); H.R. Conf. Rep. No. 661, at 262 (income-attribution requirements in Subsection (b)(2) "appl[y] only to post-eligibility treatment"). For example, "[i]n determining the income of an institutionalized or community spouse for purposes of the post-eligibility income determination," the MCCA provides that non-trust income "shall be considered only available to" the spouse in whose name the "payment of income is made." 42 U.S.C. 1396r-5(b)(2). Thus, under the court of appeals' analysis, the fact that Congress omitted any requirement that States follow that name-on-the-check rule in initial eligibility determinations would preclude States and the Secretary from following that rule in determining eligibility. Similarly, Congress's provision of mandatory rules for allocating payments made in the names of both spouses or in the name of either spouse and a third party for post-eligibility decisions, 42 U.S.C. 1396r-5(b)(2)(A)(ii) and (iii), and its failure to require use of those rules in

making initial eligibility determinations, would preclude States from employing those rules in determining eligibility. That result would frustrate, not further, Congress's intent.

3. Ultimately, a comparison between the extensive rules that Congress established for attributing income post-eligibility, see 42 U.S.C. 1396r-5(b)(2)(A)-(D) and (d)(1)-(5), and the singular prohibition (against attributing community spouse income to the institutionalized spouse) that applies in making initial eligibility determinations, 42 U.S.C. 1396r-5(b)(1), proves just one thing—that Congress did not definitively resolve most of the complex issues concerning income attribution in the context of initial eligibility determinations. The statute thus presents a textbook example of a legislative "gap." Cf. *Chevron*, 467 U.S. at 843. Consistent with the principles of cooperative federalism that undergird the Medicaid program, Congress in 42 U.S.C. 1396a(a)(17) expressed its expectation that the *States* would establish "reasonable standards * * * for determining eligibility for and the extent of medical assistance." Cf. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 506 (1990) (Medicaid provision requiring States to reimburse hospitals for "reasonable costs" is designed to afford "States some degree of flexibility to adopt their own methods"); *Lukhard* v. *Reed*, *supra* (upholding Secretary's policy of permitting but not compelling States to treat personal injury awards as "income").

Moreover, in Section 1396a(a)(17)(B), Congress expressed its expectation that it would be the *Secretary* who would establish the boundaries of reasonableness. State plans, that Section declares, must "provide for taking into account only such income and resources as are, as determined in accordance *with standards prescribed by the Secretary*, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B) (emphasis added). This Court has recognized that Congress, by using such language, "expressly *delegated* to the Secretary the power to prescribe standards." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). "In a situation of this kind, Congress

entrusts * * * the primary responsibility for" providing content to the statute "to the Secretary, rather than to the courts." *Ibid.* See also *id.* at 421-422, 429-432 (because the statute permits the Secretary to "prescribe standards," the Secretary may adopt a rule that permits States to choose among reasonable options).

In this case, the Wisconsin court ignored Section 1396a(a)(17)'s express vesting of authority in the States and the Secretary. Confronted with the MCCA's failure to provide extensive rules regarding income attribution between spouses in making initial eligibility determinations, and the absence of a definition of "community spouse's income" for purposes of 42 U.S.C. 1396r-5(e)(2)(C), the court of appeals essentially invented its own. Thus, in announcing a resources-first requirement, the court of appeals borrowed the name-on-the-check rule from the post-eligibility context, so that any income in the community spouse's name is deemed to be the community spouse's alone, and income in the institutionalized spouse's name is deemed to be the institutionalized spouse's alone. 42 U.S.C. 1396r-5(b)(2). At the same time, the court refused to attach any significance to the exception to that rule contained in Section 1396r-5(d), also applicable post-eligibility, under which income of the institutionalized spouse may be transferred and attributed to the community spouse if the income "otherwise available to" the community spouse is less than the MMMNA. See 42 U.S.C. 1396r-5(d)(1)(B) and (2). Such a pick-and-choose approach, given the statute's complexity, may well yield a *permissible* means of implementing the MCCA. But it is hardly compelled by the statutory text. Rather, one would ordinarily think that, if a State may look to the post-eligibility name-on-the-check rule for guidance in making initial eligibility determinations, it may also consider the effect of exceptions to that rule. That has long been the Secretary's view. As the Secretary explained in 1993, "[s]ince the institutionalized spouse must transfer the income

allowance to the community spouse to have it deducted in the post-eligibility calculation, the State should include this income as available to the community spouse when it counts that spouse's own income." See Pet. App. 83a.

The Wisconsin Court of Appeals offered two reasons for declining to accord the Secretary's views any weight. First, the court concluded that deference is inappropriate because the MCCA unambiguously forecloses the income-first approach. Pet. App. 16a. As we have explained above, that conclusion is demonstrably incorrect. Second, the court believed that HHS "has not interpreted the statute consistently." Pet. App. 16a. Not so: HHS without exception has taken the position that the income-first rule is a permissible methodology. See pp. 18-21, *supra*. Indeed, HHS announced its view in the State Medicaid Manual days after the MCCA became effective. See pp. 19-20 & note 5, *supra*. That guidance has not been amended since its adoption, and the Wisconsin court pointed to no HHS document or pronouncement suggesting that the income-first rule is impermissible.[6]

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[6] To the extent the agency has vacillated, it has been on whether resources-first—the alternative approach the state court imposed here—is similarly permissible. The agency policy statement issued in November 1993 suggested that the agency was "requiring" income-first, *i.e.*, "that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. 1396r-5(d)(1)(B)] before being allowed to raise the [CSRA]." Pet. App. 81a. Later, on March 3, 1994, HCFA issued a memorandum stating that the November 1993 memorandum should not be read as requiring the income-first method. *Id.* at 85a, 88a. Rather, the agency left the States "the option to use the 'income first' rule or to apply some other reasonable" methodology "until we have issued final regulations which specifically address this issue." *Id.* at 86a. Thus, HHS has never departed from its view that Section 1396r-5 permits States to use an income-first method. Rather, the agency has merely indicated that, in view of the ambiguity in the statute, the federal government would pay the resulting federal share of Medicaid benefits to States using either the income-first or resources-first method because each constitutes a "reasonable" standard for determining eligibility. See 66 Fed. Reg. at 46,766 (App., *infra*, 32a).

4. Finally, the Wisconsin court's judgment rested on a policy concern that the income-first method might leave community spouses with income that is less than the MMMNA if the institutionalized spouse dies before the community spouse does. Pet. App. 14a-15a.

As an initial matter, that analysis rests on a dubious factual assumption—that, as a general rule, when the institutionalized spouse dies, her income stream essentially disappears, rather than being transferred in large part to her spouse as a devisee or heir of her estate or as the recipient of survivor's benefits under statutory or private pension arrangements. In most benefits and pension contexts, a surviving spouse is entitled to receive, on his spouse's death, a substantial share of the benefits that were payable to the deceased spouse (or to the two spouses jointly) during her lifetime. For example, the Employee Retirement Income Security Act "requires that every qualified joint and survivor annuity include an annuity payable to a nonparticipant surviving spouse," and that the survivor's annuity be not "less than 50% of the amount of the annuity which is payable during the joint lives of the participant and spouse; * * * The statutory object * * * is to ensure a stream of income to surviving spouses." *Boggs* v. *Boggs*, 520 U.S. 833, 842-843 (1997) (citing 29 U.S.C. 1055(a) and (d)(1)). And the Social Security Act also makes provision for payment of increased old-age benefits to surviving spouses. 42 U.S.C. 402(b)(2) and (c)(3); 42 U.S.C. 402(e)(2)(A) and (f)(3)(A). See also J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 Case W. Res. L. Rev. 223, 242 (1988) ("Federal law provides that surviving spouses normally 'inherit' certain important benefits from the decedent * * *. For example, a surviving non-employee spouse normally inherits the right to receive the monthly Social Security benefits that were paid to the decedent. In addition, the survivor normally will receive a survivor's annuity from the employee's pension plan.") (footnote omitted).

Consequently, the institutionalized spouse's death does not necessarily or even ordinarily cause her income stream to become altogether unavailable to the community spouse. In fact, the institutionalized spouse's death often will *increase* the income available to the community spouse. Before the institutionalized spouse's death, much of her income must be dedicated to the substantial costs of her institutional and medical care; after her death, those costs disappear, and any Social Security, pension or other income becomes directly payable to the community spouse.

The court of appeals was also incorrect to treat the MMMNA as the minimum amount the community spouse needs after the institutionalized spouse dies. The MMMNA is set at 150% of the poverty threshold for a *couple*, plus a shelter allowance where necessary. 42 U.S.C. 1396r-5(d)(3) and (4). It thus ensures that, while the institutionalized spouse is alive, the community spouse can maintain a domicile and lifestyle suitable to a *couple*. That provision affords important protection where the institutionalized spouse may return home at some point. Once the institutionalized spouse is deceased, however, the MMMNA ceases to be a proper measure of the community spouse's needs.

In any event, the income-first method ensures that community spouses are more financially secure than, for example, spouses whose partners are never institutionalized. If a couple lives together continuously, the spouses may need to exhaust almost all of their resources before either of them can qualify for Medicaid; for the surviving spouse in such a relationship, no CSRA or MMMNA protected resources or income for his support. Yet the surviving spouse who lives with his Medicaid-eligible partner during their married life suffers no lesser loss of income upon her death than would the surviving spouse of an institutionalized partner.

Finally, the Wisconsin court's analysis wholly ignores competing policy considerations. As this Court has explained, "the Federal Government cannot finance a program

that provides meaningful benefits in equal measure to everyone. Both federal and state funds available for such assistance are limited." *Hogan*, 457 U.S. at 590. As a result, Medicaid is generally reserved for the Nation's most needy. *Ibid.* The MCCA creates a generous exception to that rule, and to the general rule that spouses are expected to support each other. Under the MCCA, if one spouse is institutionalized, the couple need not exhaust its resources; some resources are protected through the CSRA. By requiring further increases in the CSRA for the benefit of community spouses, even though most other applicants (including other couples) may have much more limited resource allowances, the court of appeals' approach necessarily decreases the funding available for potentially more needy persons in order to make additional dollars available to relatively less needy community spouses. Any policy rationale that may be thought to support such a result must be weighed against that competing concern.

Accordingly, while the resources-first approach constitutes a "reasonable" and permissible method of implementing 42 U.S.C. 1396a(a)(17) and 1396r-5(e)(2)(C), that single approach is by no means compelled by the relevant policy considerations, much less by the text of the MCCA. The income-first approach also is a reasonable and permissible method of implementing the Act, as demonstrated by the structure of the Act as a whole, the legislative history of the MCCA, and the Secretary's longstanding and consistent interpretation.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be reversed.

Respectfully submitted.

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APPENDIX A

1. Section 1902(a) of the Social Security Act, 42 U.S.C. 1396a(a) (1994 & Supp. V 1999), provides in pertinent part:

§ 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1396b of this title are authorized by this subchapter; and, effective July 1, 1969, provide for financial participation by the State equal to all of such non-Federal share or provide for distribution of funds from Federal or State sources, for carrying out the State plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, duration, scope, or quality of care and services available under the plan;

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

* * * * *

(10) provide—

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title, to—

(i) all individuals—

(I) who are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI of this chapter, or part A or part E of subchapter IV of this chapter (including individuals eligible under this subchapter by reason of section 602(a)(37), 606(h), or 673(b) of this title, or considered by the State to be receiving such aid as authorized under section 682(e)(6) of this title),

(II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter (or were being paid as of August 22, 1996) and would continue to be paid but for the enactment of that section or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title),

(III) who are qualified pregnant women or children as defined in section 1396d(n) of this title,

(IV) who are described in subparagraph (A) or (B) of subsection (*l*)(1) of this section and whose family income does not exceed the minimum income level the State is required to establish under subsection (*l*)(2)(A) of this section for such a family;

(V) who are qualified family members as defined in section 1396d(m)(1) of this title,

(VI) who are described in subparagraph (C) of subsection (*l*)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (*l*)(2)(B) of this section for such a family, or

(VII) who are described in subparagraph (D) of subsection (*l*)(1) of this section and whose family income does not exceed the income level the State is required to establish under subsection (*l*)(2)(C) of this section for such a family;

(ii) at the option of the State, to any group or groups of individuals described in section 1396d(a) of this title (or, in the case of individuals described in section 1396d(a)(i) of this title, to any reasonable categories of such individuals) who are not individuals described in clause (i) of this subparagraph but—

(I) who meet the income and resources requirements of the appropriate State plan described in clause (i) or the supplemental security income program (as the case may be),

(II) who would meet the income and resources requirements of the appropriate State plan described in clause (i) if their work-related child care costs were paid from their earnings rather than by a State agency as a service expenditure,

(III) who would be eligible to receive aid under the appropriate State plan described in clause (i) if coverage under such plan was as broad as allowed under Federal law,

(IV) with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, aid or assistance under the appropriate State plan described in clause (i), supplemental security income benefits under subchapter XVI of this chapter, or a State supplementary payment;

(V) who are in a medical institution for a period of not less than 30 consecutive days (with eligibility by reason of this subclause beginning on the first day of such period), who meet the resource requirements of the appropriate State plan described in clause (i) or the supplemental security income program, and whose income does not exceed a separate income standard established by the State which is consistent with the limit established under section 1396b(f)(4)(C) of this title,

(VI) who would be eligible under the State plan under this subchapter if they were in a medical institution, with respect to whom there has been a determination that but for the provision of home or community-based services described in subsection (c), (d), or (e) of section 1396n of this title they would require the level of care provided in a hospital, nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan, and who will receive home or community-based services pursuant to a waiver granted by the Secretary under subsection (c), (d), or (e) of section 1396n of this title,

(VII) who would be eligible under the State plan under this subchapter if they were in a medical institution, who are terminally ill, and who will receive hospice care pursuant to a voluntary election described in section 1396d(*o*) of this title;

(VIII) who is a child described in section 1396d(a)(i) of this title—

(aa) for whom there is in effect an adoption assistance agreement (other than an agreement under part E of subchapter IV of this chapter) between the State and an adoptive parent or parents,

(bb) who the State agency responsible for adoption assistance has determined cannot be placed with adoptive parents without medical assistance because such child has special needs for medical or rehabilitative care, and

(cc) who was eligible for medical assistance under the State plan prior to the adoption assistance agreement being entered into, or who would have been eligible for medical assistance at such time if the eligibility standards and methodologies of the State's foster care program under part E of subchapter IV of this chapter were applied rather than the eligibility standards and methodologies of the State's aid to families with dependent children program under part A of subchapter IV of this chapter;

(IX) who are described in subsection (*l*)(1) of this section and are not described in clause (i)(IV), clause (i)(VI), or clause (i)(VII);

(X) who are described in subsection (m)(1) of this section;

(XI) who receive only an optional State supplementary payment based on need and paid on a regular basis, equal to the difference between the individual's countable income and the income standard used to determine eligibility for such supplementary payment (with countable income being the income remaining after deductions as established by the State pursuant to standards that may be more restrictive than the standards for supplementary security income benefits under subchapter XVI of this chapter), which are available to all individuals in the State (but which may be based on different income standards by political subdivision according to cost of living differences), and which are paid by a State that does not have an agreement with the Commissioner of Social Security under section 1382e or 1383c of this title;

(XII) who are described in subsection (z)(1) of this section (relating to certain TB-infected individuals);

(XIII) who are in families whose income is less than 250 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 9902(2) of this title) applicable to a family of the size involved, and who but for earnings in excess of the limit established under section 1396d(q)(2)(B) of this title, would be considered to be receiving supplemental security income (subject, notwithstanding section 1396*o* of this title, to payment of premiums or other cost-sharing charges

(set on a sliding scale based on income) that the State may determine);

(XIV) who are optional targeted low-income children described in section 1396d(u)(2)(B) of this title;

(XV) who, but for earnings in excess of the limit established under section 1396d(q)(2)(B) of this title, would be considered to be receiving supplemental security income, who is at least 16, but less than 65, years of age, and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish;

(XVI) who are employed individuals with a medically improved disability described in section 1396d(v) (1) of this title and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish, but only if the State provides medical assistance to individuals described in subclause (XV);

(XVII) who are independent foster care adolescents (as defined in section 1396d(w)(1) of this title), or who are within any reasonable categories of such adolescents specified by the State; or

(XVIII) who are described in subsection (aa) (relating to certain breast or cervical cancer patients);

* * * * *

(17) except as provided in subsections (*l*)(3), (m)(3), and (m)(4) of this section, include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter, based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter) as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 or (with respect to States eligible to participate in

the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to States which are not eligible to participate in such program); and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums, payments made to the State under section 1396b(f)(2)(B) of this title, or otherwise and regardless of whether such costs are reimbursed under another public program of the State or political subdivision thereof) incurred for medical care or for any other type of remedial care recognized under State law;

* * * * *

2. Section 1924 of the Social Security Act, 42 U.S.C. 1396r-5 (1994 & Supp. V 1999), provides in pertinent part:

§1396r-5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to—

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted

under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u-4(a)(7) of this title) or under a PACE program under section 1936u-4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) of this section, except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides—

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust—

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust—

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)—

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and

shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2) of this section.

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include—

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which—

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds—

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of—

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g) of this section).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of—

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under sub-

paragraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(e) Notice and fair hearing

(1) Notice

Upon—

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B) of this section), of the amount of any family allowances (described in subsection (d)(1)(C) of this section), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level other-

wise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which—

(A) the greatest of—

(i) $12,000 (subject to adjustment under subsection (g) of this section), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1) of this section, or (II) $60,000 (subject to adjustment under subsection (g) of this section),

(iii) the amount established under subsection (e)(2) of this section; or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1) of this section).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) of this section shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who—

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

APPENDIX B

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 431

[CMS-2128-P]

RIN 0938-AL06

Medicaid Program; Continue to Allow States an Option Under the Medicaid Spousal Impoverishment Provisions to Increase the Community Spouse's Income When Adjusting the Protected Resource Allowance

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: Section 1924 of the Social Security Act (the Act) sets forth provisions designed to afford financial protection against impoverishment to a non-institutionalized spouse of an institutionalized individual. These provisions contain several formulas to provide this protection and specify how income and resources of spouses separated by institutionalization will be treated for purposes of determining the institutionalized spouse's Medicaid eligibility and calculating the amount the institutionalized spouse must contribute towards the cost of his or her institutional care. This proposed rule would implement certain provisions of section 1924 of the Act, which provides for fair hearings for an increase in the community spouse resource allowance.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on November 6, 2001.

* * * * *

FOR FURTHER INFORMATION CONTACT:

Roy Trudel, (410) 786-3417.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786-0626 or (410) 786-7195.

I. Background

A. Statutory Basis

Title XIX of the Social Security Act (the Act) "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Under section 1902(a)(17) of the Act, each participating State must develop a plan containing "reasonable standards * * * for determining eligibility for and the extent of medical assistance." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). Section 1902(a)(17)(B) of the Act states that those State standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient."

Section 1924 of the Act requires a State with a Medicaid program to use special rules for the treatment of income and resources of married institutionalized individuals who have spouses who are not institutionalized. (Throughout this preamble, we use the term "institutionalized spouses" to mean married institutionalized individuals and the term "community spouses" to mean spouses who are not institutionalized.) These provisions are referred to as the "spousal impoverishment" provisions. The spousal impoverishment provisions govern the allocation of income and resources between the spouses for determining Medicaid eligibility of the institutionalized spouse as well as allowing the States to determine how much income of the institutionalized spouse is available to be applied toward the cost of his or her institutional care ("post-eligibility determinations").

B. Income and Resource Allocation

Income and resource calculations for married persons have proved to be a matter of great complexity, particularly when one of the spouses is cared for in an institutional setting, such as a nursing home, but the other spouse is not institutionalized. Before 1989, the provisions governing the Medicaid eligibility of institutionalized spouses sometimes left the community spouse with income below the poverty level and with minimal resources as well. At that time, after the month of institutionalization, the income of the two spouses was considered separately in most States for purposes of determining an institutionalized spouse's eligibility. However, very little of the institutionalized spouse's income could be protected for use by the spouse in the community. This often left the community spouse with little income to live on. After the month of institutionalization, most States would consider the joint resources of the community spouse and the institutionalized spouse (subject to a limited exclusion), and any property owned solely by the institutionalized spouse to be available for the care of the institutionalized spouse. (Property owned solely by the community spouse was not considered.) Thus, depending on how resources were owned, many married couples would have to deplete almost all of their resources before the institutionalized spouse would qualify for Medicaid. The net effect of

those requirements in some cases was the "pauperization" of the community spouse. H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2, at 65 (1987).

The Congress attempted to alleviate that spousal impoverishment hardship in the Medicare Catastrophic Coverage Act (MCCA) of 1988, (Public Law 100-360, enacted on December 22, 1988.) The MCCA requires a State to use a complex set of requirements and exclusions when allocating income and resources between community and institutionalized spouses, both when the State makes the initial eligibility determination, and later in post-eligibility determinations.

In section 1924(a)(1) of the Act, it provides that the spousal impoverishment provisions "supersede any other provision" of the Medicaid statute that "is inconsistent with them." However, the MCCA did not repeal the Secretary's authority to prescribe standards (under section 1902(a)(17)(B) of the Act) for determining what income is "available" to a spouse, and the requirement for States to set reasonable standards for determining eligibility and amount of assistance. That section 1902(a)(17) authority may now only be exercised in a manner that does not contravene the specific requirements of the spousal impoverishment provisions.

With respect to the allocation of income as part of an eligibility determination, the spousal impoverishment provisions impose only a single rule. Section 1924(b)(1) of the Act provides that during any month in which an institutionalized spouse is in the institution, no income of the community spouse shall be deemed available to the institutionalized spouse (subject to certain qualifications regarding income attribution). Thus, section 1924(b)(1) of the Act establishes a special rule that protects the income of the community spouse by excluding that income from consideration when determining whether the institutionalized spouse is eligible for Medicaid. Section 1924(b)(1) of the Act, however, does not address the extent to which the State may

consider the institutionalized spouse's income available to meet the needs of the community spouse.

With respect to income attribution after the State makes the initial eligibility determination, the spousal impoverishment provisions provide more extensive guidance and requirements. Specifically, section 1924(b)(2) of the Act provides that, if payment of income is made solely in the name of one spouse, that income is generally treated as available *only* to that spouse. Section 1924(d) of the Act provides a number of exceptions to that rule, which are generally designed to ensure that the community spouse has sufficient income to meet his or her basic monthly needs. In particular, section 1924(d) of the Act provides for the establishment of a minimum monthly maintenance needs allowance for each community spouse. The community spouse's minimum monthly maintenance needs allowance is set at a level that is much higher than the official Federal poverty level. Once income is attributed to each of the spouses according to the general rules in section 1924(b) of the Act, the income attributed to the community spouse is compared to the community spouse's minimum monthly maintenance needs allowance. Section 1924(d)(2) of the Act provides that if the community spouse's income is less than the minimum monthly maintenance needs allowance, the amount of the shortfall can be deducted from the income of the institutionalized spouse that would otherwise be considered available for the care of the institutionalized spouse. The amount of that deduction is referred to as the community spouse monthly income allowance.

The deduction of the community spouse monthly income allowance, in effect, prevents income the community spouse needs to meet basic living expenses from being considered available for the care of the institutionalized spouse. The deduction thus causes Medicaid to assume a greater portion of the costs of institutionalized care. The greater Medicaid

payments for care of the institutionalized spouse would free up income to meet the minimum needs of the community spouse. The community spouse monthly income allowance, therefore, ensures that the community spouse's basic monthly maintenance needs can be met *before* the institutionalized spouse's income is considered available to pay for the costs of his or her own institutional care.

With respect to the attribution of resources between the institutionalized spouse and community spouse, the statute provides extensive rules for both initial and post-eligibility decisions. For initial eligibility determinations, each spouse's share of resources is calculated as of the beginning of the institutionalized spouse's first period of institutionalization. At that time, all of the institutionalized spouse's and community spouse's resources are tallied together, and one half of the total value is allocated to each spouse (the "spousal share"). Often, most of the resources allocated to the institutionalized spouse must be exhausted before the institutionalized spouse is eligible for Medicaid. In contrast, the community spouse's share is protected from complete exhaustion. In particular, the community spouse's resources are not considered available for the care of the institutionalized spouse (and the institutionalized spouse can become Medicaid eligible) so long as the community spouse's share does not exceed the community spouse resource allowance (CSRA). Thus, the CSRA limits the extent to which the spouses must exhaust resources before the institutionalized spouse becomes eligible for Medicaid. Section 1924(f)(2)(A) of the Act specifies that the CSRA is the greatest of (1) $12,000 or a State standard up to $60,000 (indexed for inflation; for 2001 the indexed amount is $87,000); (2) the lesser of the spousal share (approximately one-half of the spouses' pooled resources) or $60,000 (indexed for inflation); (3) the amount set at a fair hearing under section 1924(e)(2) of the Act; or (4) the amount transferred under a court order.

In allocating income and resources between spouses, States have employed two divergent methods. Under the method used by most States, known as the "income-first" method, the institutionalized spouse's income (above the allowances specified in section 1924(d) of the Act) is allocated to the community spouse for purposes of determining the extent to which the community spouse has sufficient income to meet minimum monthly maintenance needs. Under the income-first method, the CSRA is increased only if the community spouse's income will not reach his or her minimum monthly maintenance needs allowance *after* taking into account any income not protected under section 1924(d) that is available or potentially available from the institutionalized spouse. In contrast, under the other method, known as the "resources-first" method, the couple's resources can be protected for the benefit of the community spouse to the extent necessary to ensure that the community spouse's total income, including income generated by the CSRA, meets the community spouse's minimum monthly maintenance needs allowance. Additional income from the institutionalized spouse that may be, but has not been, made available for the community spouse is not considered.

C. *Current Policy and Implementation of the New Provisions*

Section 1924(e)(2)(C) of the Act provides that if either spouse establishes that the CSRA (in relation to the amount of income generated by that allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted an amount adequate to provide a minimum monthly maintenance needs allowance.

We have previously issued policy memoranda and letters expressing our view that section 1924(e)(2)(C) of the Act authorizes a State to consider potential income transfers

from an institutionalized spouse to a community spouse, so that a State may adopt the income-first method or apply some other reasonable methodology until we issue final regulations addressing the issue. Thus, under our present policy, States may clearly use the income-first method, and may be able to use other methods, such as resources-first. In other words, consistent with the statutory requirement that State's utilize "reasonable standards" for determining eligibility and the amount of benefits as described in Section 1902(a)(17), we have permitted States to employ income-first or other reasonable methodologies. In practice, no State has elected to use a method other than income-first or resources-first. The proposed regulation is therefore intended to codify and reflect longstanding State practices.

However, the issue of which criteria may be employed during the fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA has been the subject of some dispute. Permitting the community spouse to obtain a larger CSRA can give the community spouse additional income-generating resources to meet minimum monthly needs. Without an increase in the CSRA, the resources would be considered available to the institutionalized spouse and might have to be exhausted before the institutionalized spouse would be Medicaid eligible. On the other hand, permitting the hearing officer to raise the CSRA when the institutionalized spouse has income which could be used to enable the community spouse to meet minimum monthly maintenance needs can, under some circumstances, have unintended consequences for a State's Medicaid program. This policy can create an avenue for a couple to shelter almost limitless amounts of resources, provided these resources currently have minimal incoming-producing value.

Indeed, the legality of the income first rule has been challenged in several courts. The United States Courts of Appeals for the Sixth and Third Circuits have upheld the income-first rule in *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 802 (6th Cir. 1998) and *Cleary* v. *Waldman*, 167 F.3d 801, 811-812 (3d Cir. 1999), respectively. Nevertheless, the Wisconsin Court of Appeals invalidated a Wisconsin statute, which adopted the income-first rule, holding that the spousal impoverishment provisions of the Medicaid program unambiguously preclude the use of an "income-first" methodology. The United States Supreme Court has granted the State of Wisconsin's petition for review of this decision. See *Wisconsin Department of Health and Family Services* v. *Blumer*, No. 00-952.

Because this subject has been a source of some controversy, we believe it is appropriate to codify provisions regarding the community spouse resource allowance before adopting regulations governing all of the spousal impoverishment protection provisions of section 1924 of the Act.

II. Provisions of the Proposed Regulations

We propose to allow States the threshold choice of using either the income-first or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. Under our proposal, States would not be able to use different rules on a case-by-case basis, but must apply the same rule to all spouses. Under section 1902(a)(17)(B) of the Act, the Secretary has authority to prescribe appropriate standards for determining whether income is "available." In the exercise of that authority, and in view of the cooperative federalism considerations embodied in the Medicaid program, we have concluded that States may be in the best position to determine the type of protection to afford community spouses and whether to require hearing officers to

take into account any income of the institutionalized spouse before raising the CSRA.

We believe that section 1924 of the Act does not specifically address whether the income-first or resources-first method is appropriate in making the determination on raising the CSRA. Section 1924(e)(2)(C) of the Act directs the State to determine whether the community spouse's income meets his or her minimum monthly maintenance needs. It also provides that, if the community spouse's income falls short of meeting those needs, the CSRA should be increased by an amount that will generate sufficient income *to bring the community spouse's income to the minimum monthly maintenance needs level.* However, this statutory guidance does not address whether the community spouse's income may include the institutionalized spouse's income that could be made available to the community spouse.

In fact, while section 1924(b)(1) specifically prohibits the *community spouse's* income from being considered available for the care of the *institutionalized spouse*, the statute does not preclude the Secretary nor the State from considering the *institutionalized spouse's income* from being available to the *community spouse* for purposes of determining whether the community spouse's needs will be met absent an increase in the CSRA. That supports an inference that it is permissible to consider all or some portion of the institutionalized spouse's income to be available to the community spouse. In addition, the legislative history suggests that Congress contemplated the possibility that, in determining whether to raise the CSRA, States might take into account not only the community spouse's own income but "other income attributable to the community spouse" consistent with the Secretary's rules. H.R. Cong. Rep. No. 661, 100th Cong., 2d Sess 265 (1988). Accordingly, we believe that the

statute permits an income-first rule and does not foreclose a resources-first rule.

Because an income-first rule would conserve scarce resources that States may allocate towards their Medicaid programs, avoid sheltering of high value low income-producing resources, and generally affords the community spouse a significant degree of protection from impoverishment, States may prefer to employ this approach. On the other hand, the resources first rule may in certain cases afford greater protection to the community spouse, especially after the death of the institutionalized spouse. While in our view, the statute certainly does not compel States to adopt the resources-first method, we believe it would be appropriate to afford the option of selecting a resources-first rule.

Section 1924(a) of the Act provides that in determining the eligibility for medical assistance of an institutionalized spouse, its provisions supersede any other provision of title XIX of the Act, "which is inconsistent with them," including section 1902(a)(17). Section 1902(a)(17)(B) of the Act provides that the State plan for medical assistance shall "provide for taking into account only the income and resources, as are, *as determined in accordance with standards prescribed by the Secretary*, available to the applicant or recipient * * * ." (Emphasis supplied.) In *Schweiker v. Gray Panthers*, 453 U.S. 34, 44, 101 S. Ct 2633, 2640 (1981), the Supreme Court held that the underscored language constituted a delegation of substantive rulemaking authority to the Secretary. Therefore, section 1902(a)(17)(B) of the Act gives the Secretary the authority to promulgate regulations on the matter of how much income and resources are available to applicants for, or recipients of, Medicaid for determining their eligibility and the amount of assistance they may receive. Furthermore, because our proposal to permit States to use either the income-first or resources-

first method does not conflict with section 1924 of the Act, we can issue a proposed rule on this matter.

As noted above, section 1924(e)(2)(C) of the Act authorizes either spouse to establish whether the community spouse resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. However, it does not specify whether in the process of establishing the inadequacy of the community spouse resource allowance, all of the institutionalized spouse's income which could be made available to the community spouse must be taken into account before seeking this adjustment. Because section 1924(e)(2) of the Act is silent on this issue, it does not conflict with the Secretary's authority under section 1902(a)(17)(B) of the Act to prescribe standards for determining the amount of the institutionalized spouse's income that would be available to the community spouse in determining whether it is appropriate to raise the community spouse resource allowance. This determination would have a corresponding impact on the institutionalized spouse's Medicaid eligibility.

Since our decision, under section 1902(a)(17)(B) of the Act, to permit States to use either the income-first or resources-first rule does not conflict with section 1924 of the Act, we are able to issue proposed regulations on this matter. In other words, because the statute does not require nor foreclose States from using either the income-first or resources-first method, we can use the rulemaking authority under section 1902(a)(17) of the Act to leave the choice of method to the States. (This approach is consistent with the Supreme Court's decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977), which upheld a regulation that permitted States to define "unemployed" either to include families participating in a labor strike or to exclude them.) In addition, Section 1902(a)(17) contemplates that States will establish plans containing "reasonable standards" for determining eligibility

consistent with the Act and our regulations. The statute thus contemplates that different States may establish different standards for determining eligibility, so long as all are "reasonable" and all are consistent with the Act and our regulations. Accordingly, as an exercise of our discretion, we propose to leave to the States the option to either use the income-first or resources-first method for purposes of a fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA.

As such, we propose to add a new § 431.260 to provide for fair hearings to raise the community spouse resource allowance. At § 431.260(a), we propose to define "institutionalized spouse" as an individual who is married to a person who is not in a medical institution or nursing facility and who is either likely to be in an institution or nursing facility or likely to be receiving services under a home and community-based waiver under section 1902(a)(10)(A)(ii)(VI) of the Act for at least 30 consecutive days. We propose to define the term "community spouse" as the spouse of an institutionalized individual. We would define the term "community spouse resource allowance" as the amount of a couple's combined resources (held jointly and separately), allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid, as specified in section 1924(f)(2)(A) of the Act. Additionally, we would define "minimum monthly maintenance needs allowance" as the minimum amount of an institutionalized spouse's income that is protected for the community spouse.

At § 431.260(b), we would specify that either spouse may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. At § 431.260(c), we propose to

provide that the State must choose to use either the income-first method or the resources-first method when determining whether to increase the community spouse resource allowance to ensure the community spouse has sufficient income to meet minimum monthly maintenance needs. We would provide that under the income-first method, the State require that all income of the institutionalized spouse that could be made available to the community spouse after subtracting the allowances specified in section 1924(d) be considered to be available before additional resources are allocated to raise the community spouse's income to meet the minimum monthly maintenance needs allowance. We propose that under the resources-first method, the State allocate additional resources to raise the community spouse's income to meet the minimum monthly maintenance needs allowance without regard to income of the institutionalized spouse that potentially could be made available to the community spouse, but has not been made available.

III. Collection of Information Requirements

Under the Paper Work Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment if Office of Management and Budget review and approval is needed because a proposed regulation imposes a collection of information requirement. However, this proposed regulation does not impose any new collection of information requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. The proposed regulation only codifies the existing State practice of choosing whether to use income-first or resources-first, a matter we have left entirely to each State. We do not currently require States to formally notify us about which approach they take, and the proposed regulation similarly does not require this notification. Thus, the proposed rule imposes no new or different processes or information requirements on States.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

V. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). This proposed rule would give States an option to use either an income-first method or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. This proposed rule is not a major rule because it would not impose new costs on State governments or other entities. The proposed rule only codifies existing State practices, and in no way requires

States to take any action that would increase or even change their current program costs.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $25 million or less annually. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. This proposed rule would have no impact on small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. The proposed rule would have no impact on the private sector. The rule would impose no requirements on State, local or tribal governments. The rule only codifies existing State practices, and thus requires no new or additional expenditures of funds by any entity, government or private.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that would impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism

implications. Because this proposed rule only codifies existing State practices, it would impose no requirements on governments, nor does it preempt State law or otherwise have Federalism implications.

B. *Anticipated Effects*

Because the proposed rule only codifies existing State practices, it will have no new effect on State governments, providers, or the Medicaid and Medicare programs. Therefore, we are not providing an impact analyses.

C. *Alternative Considered*

We considered imposing a requirement on all States to use the income-first methodology, or a requirement that all States use the resources-first methodology when determining whether to raise the community spouse resource allowance. However, as explained in the preamble to this proposed rule, we do not believe the statute clearly requires the use of either of those alternatives to the exclusion of the other. Therefore, we believe, in the spirit of Federalism, that we should leave to States the decision as to which alternative to use.

D. *Conclusion*

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Sections Affected in 42 C.F.R. Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services propose to amend 42 CFR part 431 as follows:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

§ 431.200 [Amended]

2. Section 431.200 is amended by adding the sentence, "This subpart also implements section 1924(e)(2)(C) of the Act, which provides for a fair hearing regarding revision of the community spouse resource allowance[,]" at the end of the section.

3. A new undesignated, centered heading, and new § 431.260 are added to read as follows:

Community Spouse Resource Allowance

§ 431.260 Fair hearings to raise the community spouse resource allowance.

(a) *Definitions.* For purposes of this section, the following definitions apply:

Community spouse means the spouse of an institutionalized individual.

Community spouse resource allowance means the amount of a couple's combined jointly and separately-owned re-

sources, as specified in section 1924(f)(2)(A) of the Act, allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid.

Institutionalized spouse means an individual who meets all of the following criteria:

(1) The individual is in a medical institution or nursing facility (or at the State's option, is eligible for home and community-based waiver services under section 1902(a)(10)(A)(ii)(VI) of the Act).

(2) The individual is likely to remain in a medical institution or nursing facility (or satisfy the State option) for at least 30 consecutive days.

(3) The individual is married to a person who is not in a medical institution or nursing facility.

Minimum monthly maintenance needs allowance means the minimum amount of income, as determined under section 1924(d)(3) of the Act, that is protected for the community spouse when determining the amount of the institutionalized spouse's income that is to be applied to the cost of care.

(b) *Request for a hearing.* Either spouse (or authorized representative) may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(c) *Methodology for determining an increase in the community spouse resource allowance.* For purposes of conducting a hearing to determine whether it is appropriate to raise the community spouse resource allowance (and if so by how much) a State must elect either of the following

methods, which must apply to all hearings of this type under the State's Medicaid program:

(1) *Income-first method.* The State considers that all income of the institutionalized spouse that could be made available to the community spouse, after deducting the allowances specified in section 1924(d) of the Act, has been made available before additional resources are allocated to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(2) *Resources-first method.* The State allocates to the community spouse additional income-producing resources to raise the community spouse's income to the minimum monthly maintenance needs allowance without first considering all income of the institutionalized spouse that could be made available to the community spouse as if it has been made available.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: August 28, 2001

Thomas A. Scully,
Administrator, Centers for Medicare & Medicaid Services.

Approved: August 30, 2001

Tommy G. Thompson,
Secretary.

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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY BRIEF OF PETITIONER

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TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

REPLY BRIEF OF PETITIONER

Rather than respond to the statutory construction arguments made in the opening briefs, respondent Blumer and supporting amici primarily repeat the Wisconsin Court of Appeals' mistaken assertion that the phrase "community spouse's income" is unambiguous. Their briefs, however, neither rebut the statutory interpretation arguments of petitioner Wisconsin Department of Health and Family Services ("WDHFS") and supporting amici, nor embrace the state court's reasoning. Instead, Blumer and amici now

argue that the true meaning of the phrase is revealed by other statutes that make no reference to the income of the community spouse. These arguments all but abandon the reasoning of the court below.

A. The "income-first" rule is a reasonable interpretation of 42 U.S.C. § 1396r-5.

1. **Blumer has essentially abandoned the "plain language" approach embraced by the court below.** As pointed out in past briefs, the phrase "community spouse's income" is hardly self-explanatory. First, the phrase, by itself, does not specify whether the "community spouse's income" includes income, otherwise payable to the institutionalized spouse, which the institutionalized spouse can transfer to the community spouse for his or her benefit.[1] Second, the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), 42 U.S.C. § 1396r-5 (1994 and Supp. 2000),[2] nowhere provides rules for determining what constitutes income of the community spouse for eligibility purposes. *See* U.S. brief at 23-25; State Medicaid Agencies' amicus brief at 20-23.

Third, while § 1396r-5(b)(1) specifically prohibits money otherwise attributable to the community spouse from being considered available to the institutionalized spouse when determining eligibility, § 1396r-5 nowhere prohibits states from attributing to the community spouse income from the institutionalized spouse, where the institutionalized spouse can afford to make that income available. *See*

[1] *See* WDHFS brief-in-chief at 22-23; United States' ("U.S.") brief at 22-23; *see also Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 801-02 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998).

[2] Pub. L. No. 100-360, § 303, 102 Stat. 683. 42 U.S.C. § 1396r-5 is reproduced in both the Appendix to the Petition and in the U.S. brief (App. 10a-24a), which contains 42 U.S.C. 1396a(a)(10) and (17) (1994 and Supp. 2000) as well (App. 1a-9a). 42 U.S.C. § 1396a(r) is reproduced in the Appendix to respondent Blumer's brief (App. 1a).

WDHFS brief-in-chief at 23. That omission supports a strong inference that consideration of such potential income transfers is not prohibited. Such an inference is particularly strong in view of the background rule -- which Congress overturned only in part -- that spouses are expected to support each other. *See* U.S. brief at 3, 12 and 15-17.

Fourth, the supposition that the phrase "community spouse's income" has a clear and unequivocal meaning is belied by the fact that Congress provided extensive rules for allocating income between spouses when determining the extent of medical assistance *after* the eligibility determination is made. *See* § 1396r-5(b)(2). Congress simply chose not to provide such extensive rules for initial eligibility determinations, leaving the development of those rules to the Secretary and the states. *See* U.S. brief at 24-26.

Blumer's tautological assertion that ""community spouse's income"" is self-explanatory (*see* Blumer's brief at 15) answers none of these arguments. Nor does the assertion answer the detailed discussions of why that phrase is ambiguous within the context of § 1396r-5, the spousal impoverishment statute itself. *See* Blumer's brief at 15-18; *cf.* WDHFS brief-in-chief at 21-23; U.S. brief at 4-5 and 21-25.

Unable to find support for their interpretation of the phrase "community spouse's income" in the text of the MCCA itself, respondent and her amici ultimately all but abandon the reasoning of the court below. Instead, Blumer and the amicus Wisconsin Elder Law Bar (WI Elder Bar) now insist--for the first time in this litigation--that the term can have only one meaning based on numerous other Medical Assistance ("Medicaid" or "MA") and Supplemental Security Income ("SSI") statutes and rules, *none of which uses or refers to* the term "community spouse's income" (*see, e.g.*, Blumer brief at 6, 8, 12 and 19-22). This tactic reveals the weakness of the decision below and of Blumer's

claim that § 1396r-5(e)(2)(C) has a singular, plain meaning. In fact, the statutes on which Blumer and amici rely are, at the least, extremely difficult to decipher for any purpose relevant to § 1396r-5. Review of this litany of statutes and rules vividly confirms the position of WDHFS and supporting amici that the term "community spouse's income" is indeed ambiguous.

2. **Blumer's novel reliance on SSI standards to define the term "community spouse's income" is misplaced.** Blumer's brief and that of the WI Elder Bar advance similar arguments to the effect that the income-first rule is prohibited because the SSI rules use name-on-the-title when determining income for eligibility purposes.[3] Blumer also asserts that "the SSI program does not permit deeming of income *away* from the applicant *to* the applicant's ineligible spouse" (*id.* at 8 (emphasis in original)). The WI Elder Bar's brief makes an argument to the same effect (*id.* at 17).

Blumer relies on § 1396r-5(a)(3) in support of her claim that the SSI rules control. That provision states that "[e]xcept as [§ 1396r-5] specifically provides, [§ 1396r-5] does not apply to . . . the determination of *what constitutes*

[3]Blumer argues that Congress did not need to define "'community spouse's income'" in § 1396r-5(e)(2)(C) because, pursuant to § 1396r-5(a)(1) and (3), "the treatment of income for eligibility purposes is determined exactly as it had been prior to MCCA" (Blumer's brief at 7-8, citing 42 U.S.C. § 1396a(r)(2) and SSI rules, 42 C.F.R. §§ 435.601 and 435.831 (2000)). *See generally* Blumer brief at 6-8, 12 and 19-22. A more detailed argument to the same effect is developed at length in the amicus brief of the WI Elder Bar at 2-22, citing an array of other Medicaid and SSI statutes and rules in support of what that brief also characterizes as the plain and unambiguous meaning of the term "community spouse's income." *See id.*, also citing *inter alia*, 42 U.S.C. §§ 1396a(a)(10)(A)(ii)(V) and (a)(10)(C)(i)(III), 1396b(f)(4)(C), 1382a and 1382b (1994 and Supp. 2000); 20 C.F.R. § 416.1103 (2001) and 42 C.F.R. §§ 435.401, 435.811, 435.831-435.832(b) and 435.1005 (2000).

income or resources, or . . . the methodology and standards for *determining and evaluating income and resources*." (Emphasis supplied). But the question here is not what *constitutes* income or resources; there is no doubt that the Blumers' income is "income" within the meaning of the statute.[4] The question here is to which person - the institutionalized spouse or the community spouse - the income should be attributed. Section 1396r-5(a)(3) does not address that issue.

Nor do the SSI statutes and rules or the other Medicaid statutes and rules to which Blumer and amici refer. Those provisions do not use the terms "community spouse" or "institutionalized spouse," which are unique to the spousal impoverishment provisions of § 1396r-5. Obviously, those statutes and rules do not, even by inference, purport to define the term "community spouse's income" as used in § 1396r-5(e)(2)(C). The SSI statutes and rules defining income simply do not address and certainly do not expressly *prohibit* potential income transfers from an applicant spouse to an ineligible or non-applicant spouse when the former is institutionalized: the issue simply does not arise in that

[4]In Wisconsin, the Medicaid rules for defining and evaluating income and resources for elderly institutionalized persons are found, in turn, in the SSI statutes and rules. *See* Wis. Admin. Code § HFS 103.04(1) and (4); 42 C.F.R. § 435.601; 42 U.S.C. §§ 1382a (defining earned and unearned income and exclusions from income for SSI purposes) and 1382b (resources); *see also* 20 C.F.R. §§ 416.1100-416.1151 (SSI rules relating to income) and 416.1201-416.1266 (2001) (SSI rules relating to resources and exclusions). In this case, the Blumers' income and resources were evaluated under SSI rules and methodologies at the time of her initial application and there has never been any controversy about that evaluation in this case: Respondent Irene Blumer's personal income was *within* the eligibility limits for Medicaid and her "income eligibility" *per se* has never been in dispute. The denial of her application was based on the fact that she possessed excess *resources*, even under the greatly relaxed resource requirements of § 1396r-5.

context.[5] Thus, it is disingenuous for Blumer and supporting amici to claim that the "income first" approach is "not permitted" or "is prohibited" by unnamed SSI and Medicaid statutes and rules. Moreover, the reasoning--that because the use of income-first is not specifically authorized, it is prohibited--is flawed.

Blumer's contention that the name-on-the-check rule allegedly required in the SSI context must also apply when determining eligibility under § 1396r-5 is plainly contradicted by the text of § 1396r-5 itself. Section 1396r-5(b)(2) requires states to use the name-on-the-check rule to allocate income when determining *the extent of assistance* after the eligibility determination is made. If Medicaid required states to "treat[] each spouse's income separately" because SSI allegedly does, *see* WI Elder Bar brief at 15, that provision would be superfluous: an SSI requirement that a spouse's income be treated separately would control without specific mention of a name-on-the-check rule in § 1396r-5. It is wholly inappropriate to read a statute so as to make one of its provisions surplusage.

The fact that Congress required the name-on-the-check rule *post*-eligibility when deciding the amount of assistance, but omitted any such requirement when deciding eligibility, underscores the fact that the name-on-the-check rule is not required when making eligibility determinations. There is simply no inconsistency between the SSI rules and § 1396r-5 with respect to the "name-on-the-check" rule, as respondent and supporting amici claim.

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[5]*See* 42 U.S.C. § 1382a; 20 C.F.R. §§ 416.1100-416.1169 (2001).

3. **The income-first rule does not violate the comparability requirement of § 1396a(r)(2).**[6] Section 1396a(r)(2) was a "conforming amendment" to Title XIX enacted as part of the MCCA, but is not part of § 1396r-5, the spousal impoverishment statute itself.[7] Blumer and amici assert--though they do not describe why--the income-first rule violates § 1396a(r)(2). According to Blumer, applying subsection (r)(2)(B) to the income-first rule of § 1396r-5(e)(2)(C) "leads to the inescapable conclusion that the income-first rule denies eligibility to individuals who would be otherwise eligible if the SSI methodologies were followed." *See* Blumer's brief at 21; *see also* WI Elder Bar brief at 19-21.

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[6]This argument need not be addressed by the Court. The claim of inconsistency with the comparability requirements of § 1396a(r)(2) was neither raised nor addressed below and is outside the question presented, which is limited to *whether the income-first requirement* of Wis. Stat. § 49.455(8)(d) (1995-96) *conflicts with § 1396r-5* (*see* Petition at i). This Court ordinarily does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992).

[7]*See* Pub. L. No. 100-360, § 303(e), 102 Stat. 683, 763 (1988). The history of § 1396a(r)(2) is described in *Mowbray v. Kozlowski*, 914 F.2d 593, 596-97 (4th Cir. 1990), and, with a somewhat partisan slant in Blumer's brief at 20-21 n.7. This statute requires that the "methodology to be employed in determining income and resource eligibility" for individuals under Medicaid categories including the categorically and medically needy "may be less restrictive, and shall be no more restrictive, than," in this case, the SSI program. The language of the statute on which Blumer and amici rely is set forth in subsection (2)(B) which provides:

> For purposes of this subsection and subsection (a)(10) of this section [§ 1396a], methodology is considered to be "no more restrictive" if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.

This argument is clearly flawed. A state's Medicaid methodology is consistent with § 1396a(r)(2)(B) if, compared to application of SSI methodologies, additional individuals "may be eligible for Medicaid and no individuals who are otherwise eligible are by use of that methodology made ineligible for Medicaid." *See* 42 C.F.R. § 435.601(d)(3); *see* § 1396a(r)(2)(B). The income-first approach for increasing the Community Spouse Resource Allowance ("CSRA") creates eligibility for more applicants than would be eligible if the SSI resource limits were used. The SSI *resource limitation for an individual is $2,000 and is $3,000 for a couple*. *See* 20 C.F.R. § 416.1205(c). By contrast in Wisconsin at the time Blumer applied, the minimum or "formula" CSRA was $50,000 and the maximum was $76,740 (*see* WDHFS brief-in-chief at 7 n.6).

Given that fact, it is not possible, contrary to Blumer's claim, "that the income-first rule denies eligibility to individuals who would be otherwise eligible if the SSI methodologies were followed" (*cf.* Blumer's brief at 21). Blumer's newly-asserted claim that application of the income-first rule somehow violates 42 U.S.C. § 1396a(r)(2) should be rejected.

4. **The subsection (e)(2)(C) hearing performs an "anticipatory" function.** As we have explained, the subsection (e)(2)(C) fair hearing "provides a remedy for a couple to resolve the problem of inadequate community spousal income *before* resources which might be used to insure that protected level of income are dissipated and no longer available." *See* WDHFS brief-in-chief at 29; *see generally id.* at 28-32, arguing that neither the language of § 1396r-5(b) and (c) nor the purpose of the hearing preclude the hearing officer from considering potential income transfers from the community spouse at a hearing to raise the CSRA under subsection (e)(2)(C).

Blumer and amicus SeniorLAW strongly criticize this argument on the ground that WDHFS envisions an advisory pre-eligibility hearing divorced from an appeal of an actual adverse eligibility determination. *See* Blumer's brief at 27-28; SeniorLAW brief at 17-20. In fact, the WDHFS never suggested this at all. To the contrary, as repeatedly expressed in our opening brief, the subsection (e)(2)(C) hearing takes place following an initial denial of eligibility and a resulting request for a fair hearing.[8] Blumer's and SeniorLAW's arguments on this point tilt at an imaginary windmill.

5. **The strained assertion that "attribution" is limited to the separate treatment of income and is the opposite of deeming is contrary to the statute and its legislative history.** As we have pointed out, the Conference Report accompanying the MCCA specifically contemplates the attribution of income to the community spouse when determining his or her income at the fair hearing under subsection (e)(2)(C).[9] The state, the Conference Report declares, "must allow the community spouse to retain an adequate amount of resources to provide [for his or her] minimum monthly maintenance needs allowance ["MMMNA"] (*taking into account any other income attributable to the community spouse*)." *See* Conf. Rep. at 265, 1988 U.S.C.C.A.N. at 1043 (emphasis supplied).

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[8] *See* WDHFS brief at 28, 31-32 and 34. The latter reference, for example, repeats the point that in a fair hearing under subsection (e)(2)(C) the hearing officer "simultaneously address[es] the question of *the institutionalized spouse's MA eligibility* and the claimed inadequacy of the community spouse's anticipated income level in the context of whether to raise the amount of the resource allowance for the community spouse" (emphasis supplied).

[9] *See* WDHFS brief-in-chief at 36-37; U.S. brief at 18; and brief of other State Medicaid Agencies at 17-18, citing H.R. Conf. Rep. No. 100-661 ("Conf. Rep."), at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1043.

Blumer attempts to explain away this powerful expression of congressional intent. *See* Blumer's brief at 36-38. Pointing to a single express reference to "attribution" of income in § 1396r-5(b)(2),[10] Blumer claims that in the context of that provision, the word "attribute" is used to require *separate* treatment of income for the community spouse (Blumer's brief at 36). She deduces from that observation the further assertion that the terms "deeming" and "attribution," which she agrees *were* closely related prior to passage of the MCCA, now accomplish *opposite* results under § 1396r-5 (Blumer's brief at 37). According to Blumer, under § 1396r-5, attribution "results in the separate treatment of a couple's income" while "[d]eeming has the effect of commingling it."[11]

Blumer cites no authority for such a startling about-face in the use of language by Congress. In fact, the statute uses the term "attribution" to refer to both income and resources and frequently uses the term "considered available" as a definitional synonym in place of "attribute." *See, e.g.*, subsections (b)(2) and (c)(2). Furthermore, while attribution (like deeming) necessarily involves two parties, § 1396r-5 uses "attribution" or the synonym "considered available" to refer to both joint and separate treatment of income. *Cf.* subsection (b)(2)(A)(i) and (ii) (requiring separate treatment if income in the first instance; joint treatment in the second). Thus, Blumer's argument is unconvincing on the basis of the statute alone.

More importantly, as Blumer concedes, at the time the statute and the Conference Report were written, the terms deeming and attribution were understood to be closely related concepts (*see* Blumer's brief at 37). For example, this Court

[10]Presumably Blumer refers to subsection (b)(2)(B)(i), though she does not specifically cite it. *See* brief at 36.

[11]Blumer's brief at 37; *cf.* WDHFS brief-in-chief at 7 n.7 (discussing "attribution" and "deeming").

referred to "attributing" as a synonym for "deeming" in the context of deeming the income earned by one spouse to the other in *Herweg v. Ray*, 455 U.S. 265, 270 (1982). Congress is assumed to use terms as they have been interpreted by the Court. There is simply no evidence in § 1396r-5 or the conferees' explanation of subsection (e)(2)(C) to support Blumer's strained and unnatural explanation of the legislative comment that, in considering whether to increase the CSRA under subsection (e)(2)(C), a state may "'tak[e] into account any other income attributable to the community spouse.'"

Instead, the legislative history memorialized in the report supports the "income-first" rule: it clearly indicates that Congress was concerned that *all* income actually attributable to the community spouse by operation of the various provisions of the statute, including subsection (d)(1)(B) would be taken into account at the fair hearing. *See Cleary ex rel. Cleary v. Waidman*, 167 F.3d 801, 811 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999).

Blumer also complains that WDHFS and supporting amici read too much into the fact that the conferees who adopted the compromise fair hearing remedy now contained in subsection (e)(2)(C) eliminated, at the same time, a Senate provision expressly *mandating* a resource-first method of protecting additional resources for the community spouse. *See* Blumer brief at 32-36; *cf.* WDHFS brief-in-chief at 34-36. Blumer insists that the conferees retained the express mandatory resource provision of the Senate bill by covertly inserting a "resource-first" requirement into subsection (e)(2)(C). Like Blumer's strained attempt to define attribution discussed above, she offers a counter-intuitive explanation of the legislative history that is not supported by the Conference Report[12] or the statute.

[12]*See* Conf. Rep. at 265 and 267, 1988 U.S.C.C.A.N. at 1043 and 1045.

As a matter of statutory interpretation, § 1396r-5(a) and the other Medicaid and SSI statutes Blumer and amici now cite neither preclude income-first nor require the resource-first interpretation.

B. The Secretary's longstanding interpretation of § 1396r-5(e)(2)(C) permitting states to employ the income-first rule is entitled to *Skidmore*[13] deference.

1. **The Secretary's authority under § 1396a(a)(17) to determine reasonable standards for Medicaid eligibility is superseded only in limited respects with regard to § 1396r-5.** Under 42 U.S.C. § 1396a(a)(17), the states must include in their respective Medical Assistance plans "reasonable standards . . . for determining eligibility for and the extent of medical assistance." *Id.* Congress has delegated to the Department of Health and Human Services' ("HHS") Secretary exceptionally broad authority to promulgate rules defining MA eligibility requirements, including standards for determining the availability of income and resources. *See* § 1396a(17)(B) and (D); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

In prior briefs, WDHFS and the United States have relied on the authority contained in § 1396a(a)(17) to support deference to the HHS Secretary's longstanding informal views permitting states to employ the income-first rule when determining an applicant's eligibility for Medicaid in the context of a fair hearing under § 1396r-5(e)(2)(C). *See* WDHFS brief-in-chief at 37; U.S. brief at 2, 13-17 and 25-26. The Secretary's informal interpretation of subsection (e)(2)(C) has now been formalized in a proposed administrative rule published on September 7, 2001, by the Centers for Medicare and Medicaid Services ("CMS")

[13]*See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

(formerly the Health Care Financing Administration ("HCFA")). *See* 66 Fed. Reg. 46,763 (2001) (U.S. App. 25a-44a).

Blumer and amicus WI Elder Bar challenge the scope of the Secretary's authority under § 1396a(a)(17) to interpret the spousal impoverishment provisions of § 1396r-5 based on § 1396r-5(a)(1). The WI Elder Bar makes the broadest possible attack, insisting on the basis of subsection 5(a)(1) that "Congress superseded § 1396a(a)(17) . . . as *per se* inconsistent with the spousal impoverishment section." (*See* WI Elder Bar brief at 10). Blumer takes a more limited view of the effect of § 1396r-5(a)(1), arguing that the "deeming provision" of § 1396a(a)(17) was "specifically superseded" by the former provision (*see* Blumer's brief at 39). She adds that "[a]s a result, CMS simply cannot speak with the force of law on this issue . . ." (*see id.*; *see also id.* at 8 and 22).

This challenge to the Secretary's interpretative and rule-making authority under § 1396a(a)(17) is anticipated in some detail in the U.S. brief (*see id.* at 2-3, 12-17 and 25) and is addressed by the proposed CMS rule (*see* U.S. App. at 26a-37a).[14] The claim that § 1396r-5 wholly supersedes the Secretary's authority under § 1396a(a)(17) is refuted by the text of the statute. 42 U.S.C. § 1396r-5(a)(1) provides that "[i]n determining the eligibility for medical assistance of an institutionalized spouse . . . ," the provisions of § 1396r-5 "supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) . . .) which is *inconsistent* with them" (emphasis supplied). As § 1396r-5(a)(1) and the

[14]At this point, absent a final rule, it appears that the Secretary's views expressed in the Notice of Proposed Rulemaking remain entitled to deference under the *Skidmore* standard, as argued in WDHFS brief-in-chief at 37-47. However, the care and persuasiveness of the agency's explanation for its position, including the basis for its interpretation of the provisions of § 1396r-5(e)(2)(C), are surely relevant to analysis of the factors warranting *Skidmore* deference. *See* WDHFS brief-in-chief at 40-47.

Conference Report indicate, § 1396r-5 supersedes other provisions of the Medicaid statute only to the extent that those other provisions are inconsistent.[15]

Referring to § 1396r-5(a)(1), the narrative accompanying the proposed CMS rule explains the relationship of that provision to § 1396a(a)(17):

> [T]he MCCA did not repeal the Secretary's authority to prescribe standards . . . [under § 1396a(a)(17)(B)] for determining what income is "available" to a spouse, and the requirement for States to set reasonable standards for determining eligibility and amount of assistance. *That [§ 1396a(a)(17)] authority may now only be exercised in a manner that does not contravene the specific requirements of the spousal impoverishment provisions.*[16]

Given the language of § 1396r-5(a)(1) itself, the Secretary's view of the extent to which the agency's interpretative and rulemaking authority under § 1396a(a)(17) is limited by the former section appears not only reasonable, but unassailable. That is, the Secretary has not been deprived of the authority to interpret the spousal impoverishment provisions. Rather, that general authority may only be exercised in ways that are consistent with specific spousal impoverishment protections of § 1396r-5.

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[15]According to the Conference Report, provisions of § 1396r-5 "supersede other provisions of title XIX, *to the extent they are inconsistent*, for purposes of determining eligibility of an institutionalized spouse." Conf. Rep. at 259, 1988 U.S.C.C.A.N. at 1037 (emphasis supplied).

[16]U.S. App. at 28a (emphasis supplied).

For example, based on § 1396r-5(a)(1) and (b)(1), the Secretary cannot, pursuant to § 1396a(a)(17)(D) permit the income of the community spouse to be deemed available to the institutionalized spouse during any month of institutionalization, except as provided in § 1396r-5(b)(2). Therefore, Blumer's claim that the "deeming provision" of § 1396a(a)(17)(D) was superseded by § 1396r-5(a)(1) is correct, but only to the extent that the former section is inconsistent with § 1396r-5(b)(1).

Where there is no inconsistency or where § 1396r-5 is silent, nothing in § 1396r-5(a)(1) prevents the Secretary from exercising existing authority under § 1396a(a)(17) to interpret the spousal impoverishment provisions of § 1396r-5 and, under § 1396a(a)(17)(B), to set reasonable standards for eligibility consistent with specific requirements of § 1396r-5. Because nothing in § 1396r-5 bars use of the income-first rule, the Secretary may establish rules, and the states may create "reasonable standards" using that rule.

Consistent with §§ 1396r-5(d) and 1396a(a)(17)(B), therefore, the Secretary certainly may interpret the provisions permitting *post*-eligibility transfers of income by the institutionalized spouse for the purposes set forth in § 1396r-5(d)(1)(A)-(D), including income transfers to the community spouse. The Secretary may also, consistent with §§ 1396a(a)(17)(B) *and* 1396r-5(a)(1), permit states to take these potential post-eligibility income transfers into account when considering whether to increase the CSRA at an eligibility hearing under § 1396r-5(e)(2)(C).

2. **Blumer and amici offer no policy basis for their insistence that the states lack discretion to employ the income-first rule.** Both Blumer and the amicus brief of the Ohio State Bar and National Academy of Elder Law Attorneys (OH-NAELA) argue emphatically that while states have wide discretion to set the CSRA and MMMNA, the states have no discretion to choose between the income-first

and resource-first interpretations of § 1396r-5(e)(2)(C). *See* Blumer's brief at 31-32; OH-NAELA brief at 8 and 17-18.

This argument, however, does not promote respondent's case. The OH-NAELA brief demonstrates that Wisconsin has chosen to set the CSRA and MMMNA limits near the high end of the permissible range in both instances (*id.* at 2-3). This means that Wisconsin has chosen to be relatively generous in administering the spousal impoverishment provisions and that a higher percentage of Wisconsin couples will likely be eligible for benefits under § 1396r-5 than in a state which has set the CSRA at a relatively low level. At the same time, employment of the income-first approach also allows Wisconsin to stick much closer to its own standard CSRA limit than it would under a resource-first rule, thereby attempting to enforce a meaningful degree of institutional equity among those seeking eligibility under the spousal impoverishment provisions of § 1396r-5.[17]

Blumer and the OH-NAELA amicus also suggest that having the discretion to choose between the resource-first or the income-first approaches may have a significant impact on whether a state sets a high or a low CSRA limit or a high or low level for the MMMNA. Indeed, both Blumer and the OH-NAELA amicus acknowledge as much: they suggest, no doubt rhetorically, that states like Wisconsin could control their costs under a mandatory resource-first rule by setting the MMMNA or the CSRA or both at significantly lower levels. *See* Blumer's brief at 32; OH-NAELA amicus at 16.

But forcing states to lower their across-the-board MMMNA and CSRA to fund a more generous *exception* to those limits hardly serves the purposes of the statute. Moreover, Blumer and amici offer no reason why the states'

[17]It is precisely this aspect of the income-first approach that Blumer and supporting amici repeatedly attack.

broad discretion to set state policy with regard to the spousal impoverishment provisions of § 1396r-5 should not also include the discretion to choose between the income-first or the resource-first approaches. They offer no policy answer to the obvious question why a state like Wisconsin, which has chosen to set its Medicaid eligibility limits at more generous levels and to serve higher numbers of its citizens, should be forced to restrict those eligibility limits and serve fewer people as a price for being required to use resource-first.

3. **Application of the income-first approach does not reduce community spouses to poverty.** In a number of instances, Blumer's brief and that of supporting amici inaccurately or unfairly criticize the income-first approach in ways that require correction. It is undisputed that the MCCA has a laudable purpose--that of protecting community spouses from impoverishment. The statute is also designed, however, to avoid protecting an *excessive* amount of resources. Blumer and supporting amici ignore the fact that the statutory protection is limited both by the statutory limits Congress placed on the CSRA and MMMNA and by limitations states themselves place on the specific levels of resources and income each will permit a community spouse to retain.[18]

While Congress may have expanded Medicaid from a strict welfare program to a "safety net" approach, it is inaccurate to claim that the spousal impoverishment protections were intended to provide community spouses with the "financial security to live independently in the community throughout life" (*see* Blumer's brief at 13). Nor

[18]The statutory protections are also limited by the hard economic fact that the couples most in need of protection under § 1396r-5 are those with incomes and resources well *within* the maximum limits set by the individual states. For those couples, the benefits of the resource-first approach are meaningless. By definition, only couples with resources above the state's maximum CSRA will benefit from a resource-first approach.

is § 1396r-5 a savings plan where contributors automatically take out a "fair share" of what they put in. The MCCA was never envisioned as an income maintenance program for persons with income and assets well above the poverty level, but instead, as a program to protect spouses from actual impoverishment and destitution resulting from the costs of long term care for an institutionalized spouse.

Blumer also describes income-first as a device permitting states "to take income *away* from an institutionalized applicant . . . for the purpose of *denying* that applicant benefits" (brief at 22). While this turn of phrase catches the eye of the reader, use of income-first does *not* in fact take income "away" from an institutionalized spouse. Rather, it permits the state to assess whether his or her community spouse will have income up to the level of the MMMNA to meet his or her own needs once eligibility occurs. And once eligibility does occur, that income may then be used to support the community spouse instead of being required to pay for the institutionalized spouse's care. The Medicaid program, in effect, makes up the difference when evaluating the portion of the institutionalized spouse's income for which it will pay. *See* § 1396r-5(d)(2).

Blumer's brief also suggests that, because of income-first, Burnett Blumer will be left in poverty if Irene predeceases him (*id.* at 24-25). In fact, should Irene die first, Burnett will be left with the remaining income-producing assets making up the CSRA ($72,822 in this case), together with their home, vehicle and other excluded resources. That is almost certainly more than Burnett would retain had Irene sought Medicaid benefits while still living at home. In addition, Burnett will still have his own income, which was close to the level of the MMMNA in 1997 when this case arose. As Blumer's own brief points out, the level of the MMMNA in Wisconsin is set at 200% of the poverty line for a family of two (*id.* at 5 n.3). Thus, should Irene predecease

Burnett, he is likely to have income approaching 200% of the poverty line for a couple.

While Burnett may be left with less monthly income under income-first than under resource-first, he will in neither case be left impoverished. In other words, in this particular case, the spousal impoverishment protections of § 1396r-5 will, in fact, achieve their purposes.

The income-first rule is a reasonable interpretation of an ambiguous provision of a highly complex statute, § 1396r-5. The Secretary's longstanding, consistent interpretation of the statute as permitting states to employ the income-first approach is entitled to deference under the *Skidmore* standard.

CONCLUSION

The decision of the Wisconsin Court of Appeals should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-9952

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ of Certiorari to the
Wisconsin Court of Appeals, District IV

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The Medicaid agencies of fourteen states respectfully submit this brief *amici curiae* in support of the petitioner in

this case. Petitioner and respondent have consented to the filing of this brief.[1]

INTERESTS OF *AMICI CURIAE*

The amici curiae are the Medicaid agencies of the states of Alabama, Alaska, Idaho, Kansas, Kentucky, Louisiana, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, and Washington (the "amici states"). This brief is submitted on their behalf.

Each of the amici states participates in the Medicaid program. As such, each state must comply with the Medicaid Act, 42 U.S.C. 1396 *et seq.* (1994 & Supp. 2000), and the federal regulations promulgated thereunder. *See Atkins v. Rivera*, 477 U.S. 154, 156 (1986). Within those parameters, however, the states have broad discretion to adopt standards for determining the extent of medical assistance provided, as long as such standards are reasonable and consistent with the objectives of the Act.

This case arises out of the "spousal impoverishment" provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (2001). Those provisions govern the allocation and distribution of a married couple's resources and income when one spouse (the "institutionalized spouse") is in a nursing home and seeks Medicaid benefits and the other spouse (the "community

---

[1] Under Rule 37, States are not required to obtain consent. Consent has been obtained here, however, in light of the fact that the brief is being submitted on behalf of agencies of the States. Correspondence reflecting the parties' consent has been lodged with the Clerk. Pursuant to Rule 37.6, the *amici* state that no counsel for the petitioner or the respondent authored this brief in whole or in part. Nor did any person or entity, other than the *amici*, make a monetary contribution to the preparation or submission of this brief.

spouse") still resides in the community. These rules were enacted in response to former rules that had the effect of leaving the community spouse with little or nothing on which to live once the institutionalized spouse became eligible for Medicaid. To that end, the provisions establish certain standard rules and thresholds that the states must follow both in determining the Medicaid eligibility of the institutionalized spouse in the first instance and in determining how much income the institutionalized spouse must contribute towards the costs of his care once eligibility is established.

The provisions also provide for fair hearings in certain situations in which the standard allowances set by Congress are insufficient to protect the community spouse. It is the fair hearing portion of the statute -- in particular, subsection (e)(2)(C) -- that is at issue here. Subsection (e)(2)(C) mandates an increase in the standard level of resources protected for the community spouse if the "community spouse's income" does not meet a certain minimum monthly need amount established by Congress. 42 U.S.C. § 1396r-5(e)(2)(C) (2001). The issue presented in this case is what the states may consider as "the community spouse's income" in making this determination.

The amici states have a substantial interest in this issue because many of them, like the petitioner, follow an "income-first" approach in determining whether to allow the community spouse to retain more resources than the standard amount provided in the statute. Other of the amici states, while not presently utilizing an income-first approach, wish to retain the option of applying that approach in the future.

Under the income-first approach, the state considers as part of the "community spouse's income" income that the statute expressly permits the institutionalized spouse to transfer to the community spouse to help meet her minimum monthly need. Only if this transferable income, together

with income in the community spouse's own name, is not adequate to meet the monthly need do these states permit the community spouse to protect a higher level of resources than the standard amount provided in the statute.

In contrast, a minority of states apply a "resource-first" approach. Under the resource-first approach, the state does not consider any income expressly transferable from the institutionalized spouse as part of "the community spouse's income" in determining whether to increase the standard resource allowance under subsection (e)(2)(C). Rather, the hearing officer must increase the amount of resources protected for the community spouse to a level sufficient to generate any shortfall between the minimum monthly need amount and income in the community spouse's own name.

The income-first approach has been upheld as a permissible interpretation of subsection (e)(2)(C) by every United States Court of Appeals and state court of highest resort to consider the issue. *See Cleary v. Waldman*, 167 F.3d 801, 811 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797-98 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998); *Thomas v. Comm'r of the Div. of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997); *Golf v. New York Dep't of Soc. Servs.*, 697 N.E.2d 555, 558 (N.Y. 1998). In the case presently on review, however, the Wisconsin Court of Appeals held that the statute does not permit the income-first approach but rather mandates a resource-first approach.

The practical effect of a mandatory resource-first rule would be to allow couples in every state to shelter a substantially larger share of their resources from being spent down to qualify the institutionalized spouse for Medicaid. In cases involving community spouses with very little income in their own name, the amount that would need to be protected to generate sufficient income can add up to hundreds of thousands of dollars that normally would have

been spent on the institutionalized spouse's care before he or she qualified for Medicaid.

The import of this question for the amici states cannot be overstated. A mandatory resource-first rule, if sustained, would require a significant portion of the states' Medicaid budgets to be redirected to provide nursing home care for the middle class and would detract from the program's primary mission of providing medical care for the needy. Although the cost of a mandatory resource-first rule on a going-forward basis is difficult to quantify, the petitioner Wisconsin Department of Health and Family Services estimates the on-going costs of complying with such a rule to be $10 million per year in Wisconsin alone. *See* Pet. and App. for Writ of Cert. at 20 (filed Dec. 2000).

SUMMARY OF ARGUMENT

This case involves the spousal impoverishment provisions of the Medicaid Act. These provisions were enacted to remedy a flaw in the prior law as applied to married spouses that had the effect of impoverishing the spouse in the community when the other spouse entered a nursing home and sought Medicaid assistance. Under the prior rules, nearly all of a couple's joint resources would have to be spent down to qualify the institutionalized spouse for Medicaid. Once the institutionalized spouse qualified, the prior rules then required that nearly all of a couple's income be used to offset the costs of his or her care. This left the community spouse with little or nothing on which to live after the institutionalized spouse became Medicaid eligible.

The spousal impoverishment provisions attempted to address this problem by establishing various rules and thresholds for the allocation and distribution of income and resources between married spouses both pre- and post-eligibility. As to income, the provisions establish standard rules for the division of income between the spouses that

renders income in the community spouse's own name unavailable to the institutionalized spouse to offset the costs of his care. They then establish a "monthly need" threshold for the community spouse and allow the institutionalized spouse to transfer some of his or her income to the community spouse, if needed, to meet this monthly need. As to resources, they establish standard rules for the calculation and allocation of a couple's joint resources at the very beginning of the institutionalization in order to ensure that a certain amount of resources will not be spent down in qualifying the institutionalized spouse for Medicaid. They then provide that this amount, deemed the "resource allowance," may be transferred to the community spouse once the institutionalized spouse qualifies for Medicaid.

The provisions also provide for a hearing process that allows a couple to challenge the calculation of the various components that make up what the community spouse is allowed to keep. The spouses also may request a fair hearing to make adjustments where the standard allocations are insufficient to protect the community spouse adequately. One such provision permits a hearing officer to set a higher resource allowance where the income generated off the standard resource allowance is inadequate to raise the community spouse's income to the monthly need level. It is this provision, 42 U.S.C. § 1396r-5(e)(2)(C) (2001), that is in dispute.

Specifically, subsection (e)(2)(C) provides that "if either spouse establishes" that the standard resource allowance, in relation to the amount of income it generates, "is inadequate to raise *the community spouse's income*" to the minimum monthly need amount "there shall be substituted" for the standard resource allowance "an amount adequate to provide" the monthly need amount. 42 U.S.C. § 1396r-5(e)(2)(C) (2001) (emphasis added).

The question presented in this case is whether, in determining whether to substitute a higher resource allowance under subsection (e)(2)(C), the states may apply an "income-first" approach, or whether they must apply a "resource-first" approach. The income-first approach allows the state to consider as part of the "community spouse's income" transfers of income from the institutionalized spouse that the statute specifically permits to be made for the very purpose of meeting the community spouse's monthly need amount. Only if *all* sources of income contemplated under the statute are insufficient to meet the monthly need is a higher resource allowance substituted for the standard resource allowance. The resource-first approach, by contrast, precludes consideration of these income transfers as part of the "community spouse's income" in determining whether a higher resource allowance is warranted.

Opponents of the income-first approach argue that the plain meaning of "community spouse's income" in subsection (e)(2)(C) refers only to income in the community spouse's own name and does not contemplate potential transfers of income from the institutionalized spouse. This overly narrow interpretation of the statute -- the effect of which is to allow couples to shelter substantially more resources -- is inconsistent with the mechanics of the spousal impoverishment provisions themselves, the drafting history of subsection (e)(2)(C), and interpretive guidance from the federal agencies, all of which refute any suggestion that the statute mandates a resource-first approach.

It is also contrary to the reasoned analysis of every federal court of appeals and state court of last resort to have considered the issue, all of which have held that the statute is ambiguous in this regard and that either approach is permissible. *See Cleary*, 167 F.3d at 811; *Chambers*, 145 F.3d at 797-98; *Thomas*, 682 N.E.2d at 879; *Golf*, 697 N.E.2d at 558. As these courts have recognized, the mandatory resource-first rule reflects a fundamental

misunderstanding of the statute that fails to take into account the statute's overall structure, all of the provisions that address protection of income for the community spouse, and the role of subsection (e)(2)(C) in the statutory scheme.

ARGUMENT

I. OVERVIEW OF THE SPOUSAL IMPOVERISHMENT PROVISIONS

This case concerns the permissibility of the "income-first" rule followed by the amici states in applying 42 U.S.C. § 1396r-5(e)(2)(C) (2001). This question boils down to the meaning of three words in a subparagraph of a paragraph of a subsection in a complex statutory scheme. Given the complexity of the Medicaid Act generally and the spousal impoverishment provisions in particular, the meaning of these words cannot be understood without reference to the background and purpose of the spousal impoverishment provisions, the manner in which those provisions attempt to achieve this purpose, and the role that subsection (e)(2)(C) plays in the statutory scheme as a whole. The amici states therefore believe that they can best assist the Court by providing a comprehensive overview of the history, structure, and mechanics of the spousal impoverishment provisions.

A. Relevant Medicaid Eligibility Standards

Speaking very generally, Medicaid eligibility depends on two factors: level of income and level of resources. Each participating state develops a plan containing "reasonable standards . . . for determining eligibility for and the extent of medical assistance." 42 U.S.C. § 1396a(a)(17) (2001). These standards must "provide for taking into account only such income and resources as are, as determined in accordance with the standards prescribed by the Secretary, available to the applicant or recipient." *Id.* Thus, in order to be eligible for Medicaid, an individual must not have

"available" income in excess of certain prescribed limits. In making this calculation for applicants with income above such limits, a state may reduce countable income by the amount of incurred medical expenses (sometimes referred to as the "spend-down" option). *See Atkins v. Rivera*, 477 U.S. 154, 154 (1986). An applicant's resources also may not exceed certain prescribed limits. Applicants with resources in excess of those limits must deplete their resources to that limit before becoming eligible (also referred to herein as "spending down"). 42 U.S.C. § 1396a(a)(10)(17). Even after an individual becomes eligible for Medicaid, the program does not pay the full cost of care. Rather, the Medicaid rules require that the eligible individual use his own income to offset some of the costs of his or her care. The Medicaid program then covers the remainder.

Over time, certain "pre-eligibility" rules and principles have been developed to address the attribution of income received by couples when one spouse is pursuing Medicaid eligibility and with transfers of resources between spouses or other related parties where such transfers implicate Medicaid eligibility. Once a person qualifies for Medicaid, there are further "post-eligibility" rules that concern the amount of Medicaid benefits payable for that person's care. These rules relate to the amount of the couple's income that must be applied to the cost of nursing home care (and other health care) before Medicaid benefits become available to pay the remainder.

B. The Pauperization of the Community Spouse Under the Old Law

Prior to 1988, the rules concerning income and resources, when applied to a married person whose spouse remained in the community, had the effect of leaving the community spouse with little or nothing on which to live once the institutionalized spouse became eligible for Medicaid. In particular, the pre-eligibility rules that were in

place required the spouse seeking benefits to liquidate virtually all of the couple's joint resources in order to reach Medicaid eligibility levels. *See* H.R. Rep., No. 105(II), 100th Cong., 2nd Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 857, 889-90; *Ford v. Iowa Dep't of Human Servs.* 500 N.W.2d 26, 27 (Iowa 1993). This depletion in resources was compounded by the fact that, once the institutionalized spouse became eligible for Medicaid, the post-eligibility rules required that most of the couple's income be used to offset the cost of the institutionalized spouse's nursing home care before Medicaid payments would become available. *See Schachner v. Perales*, 648 N.E.2d 1321, 1322 (N.Y. 1995).

C. The Medicaid Catastrophic Coverage Act of 1988

In 1988, Congress attempted to address this problem by enacting the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, 102 Stat. 683. The purpose of these provisions was to "to end th[e] pauperization [of the community spouse] by assuring that [she] has a sufficient -- but not excessive -- amount of income and resources available" when the other spouse is institutionalized in a nursing home. H.R. Rep. No. 105 (II), *reprinted in* 1988 U.S.C.C.A.N. at 888; *see also* 133 Cong. Rec. 29,353 (1987) (statement by Sen. Mikulski).

As the above statement reflects, the amendments were directed at two perceived flaws in the prior Medicaid rules when applied to elderly couples when one spouse requires nursing home care. The primary concern was the impoverishment of the community spouse discussed above. A secondary concern, however, was a loophole in the old law that allowed certain couples whose financial positions would normally not qualify them for medical assistance to shelter a majority of their resources in the community spouses' names based on the legal title principle, while the institutionalized

spouse received medical care paid by public funds. *See, e.g.*, 133 Cong. Rec. 20,692 (1987) (statement of Rep. Tauke) (amendments "will change the unfair policy which requires noninstitutionalized spouses to be impoverished . . . and at the same time . . . ensure that no one escapes contributing a fair share to nursing home care costs").

D. The Mechanics of § 1396r-5

Congress balanced these twin goals through a complex and intertwined set of standard requirements and exclusions that a state must apply when allocating income and resources between an institutionalized and a community spouse, both pre- and post-eligibility. *See* 42 U.S.C. § 1396r-5 (2001) (the "statute"). The statute sets forth a series of standard rules for *calculating* spousal income and resources for eligibility purposes, *protecting* certain resources from being depleted to qualify the institutionalized spouse for Medicaid pre-eligibility, *protecting* certain income from being spent on the care of the institutionalized spouse, both pre- and post-eligibility, and *transferring* certain income and resources to the community spouse after eligibility has been established.

1. Income Standards and Transfers

Subsections (b) and (d) of the statute relate to income. The primary concern of these subsections is post-eligibility -- *i.e.*, what portion of a couple's monthly income is required to go towards offsetting the costs of the institutionalized spouse's care once he or she becomes eligible for Medicaid and, conversely, what portion will be left to *protect* the needs of the community spouse. Subsection (b) -- entitled "Rules for treatment of income" -- governs the *calculation* of the respective income of each spouse for purposes of determining what income will be considered available to the institutionalized spouse. Subsection (b)(2) provides that, in "determining the income of an institutionalized spouse or

community spouse for purposes of the post-eligibility income determination described in subsection (d)," income will be considered available to a particular spouse based on the "name-on-the-check" principle. Under this principle, income is considered "available" only to that spouse in whose name payment is made. Income paid in the names of both spouses is evenly divided between them. § 1396r-5(b)(2).

Only subsection (b)(1) applies to pre-eligibility income determinations. It applies both pre- and post-eligibility and provides that "no income of the community spouse shall be deemed available to the institutionalized spouse," subject to certain exceptions. § 1396r-5(b)(1). This departs from prior practice whereby many states regarded the income of either spouse as available to the other for eligibility purposes.

Once eligibility is established, subsection (d) -- entitled "Protection of income for the community spouse" -- then provides for a *transfer* to the community spouse of income deemed available to the institutionalized spouse under subsection (b)(2) (*i.e,* income in the institutionalized spouse's name) where necessary for the *protection* of the community spouse. The stated purpose of this transfer is to ensure that the community spouse has sufficient income to meet his or her basic monthly needs after the institutionalized spouse has spent down to Medicaid eligible levels and must contribute income to offset the costs of his or her care. § 1396r-5(d)(1)(B). Subsection (d) accomplishes this by setting a level defining the community spouse's "minimum monthly maintenance needs allowance" (referred to herein as the "monthly need") as an amount considerably above the poverty level to be established by each state. *Id.* at § 1396r-5(d)(3). It then permits the institutionalized spouse to make an income transfer to the community spouse if the income "otherwise available" to the community spouse is less than this minimum monthly need. § 1396r-5(d)(2). That transferable amount, termed the "community spouse monthly

income allowance" (referred to herein as the "income transfer"), is defined as the amount by which the monthly need exceeds "the amount of monthly income otherwise available to the community spouse." § 1396r-5(d)(2).[2] The state may not consider this transferable income as available to the institutionalized spouse in determining the amount of income that must be used to offset the costs of his care. § 1396r-5(d)(1).

2. Resource Standards and Transfers

Subsections (c) and (f) of the statute relate to resources. In contrast to the post-eligibility focus of the income provisions, the primary focus of the resource provisions is the pre-eligibility depletion of resources necessary to qualify the institutionalized spouse for Medicaid. Subsection (c) -- entitled "Treatment of resources" -- deals with the *calculation* of resources for eligibility purposes. Subsection (c)(1) directs the responsible state agency to make certain resource calculations upon the institutionalization of one spouse. In particular, it directs the agency to calculate both the total value of the couple's combined resources (subject to certain exceptions) and a "spousal share" equal to one-half of that total value. § 1396r-5(c)(1)(A). Subsection (c)(2) then provides that, regardless of state laws relating to community property or the division of marital property, all of a couple's resources are considered available to the institutionalized spouse for eligibility purposes, except for the community spouse resource

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[2] If the institutionalized spouse refuses to transfer income to the community spouse, the statute contemplates a court order of support that will determine the amount of the income allowance. § 1396r-5(d)(5).

allowance provided for in subsection (f)(2)(A). § 1396r-5(c)(2).

Subsection (f) then addresses the *transfer* and *protection* of resources for the community spouse. Subsection (f)(1) protects against the sheltering of excessive resources in the community spouse's name by providing that an institutionalized spouse may only transfer to the community spouse an amount equal to the "community spouse resource allowance." § 1396(f)(1) (2001). Subsection (f)(2) then defines the community spouse resource allowance as equal to the spousal share, subject to certain statutory maximums and minimums. § 1396r-5(f)(2). Only those resources in excess of the resource allowance are considered available to the institutionalized spouse for eligibility purposes. § 1396r-5(c)(2). Although the resource allowance is *calculated* pre-eligibility so that it can be protected from depletion in qualifying the institutionalized spouse for Medicaid, the actual *transfer* of the resource allowance does not occur until after eligibility. § 1396r-5(f)(1).

3. Adjustments to the Standard Allowances

Subsection (e) of the statute provides for administrative hearings in certain circumstances in which the standard rules described above do not suffice to protect individual community spouses. § 1396r-5(e)(2). For example, the state may set a higher monthly need allowance than the standard amount provided in subsection (d)(2)(A) upon a showing of "exceptional circumstances resulting in significant financial duress." § 1396r-5(e)(2)(B). In addition, the community spouse can receive a higher resource allowance than that provided in subsection (f)(2) upon a showing that the standard resource allowance is "inadequate" in relation to the amount of income that the allowance generates "to raise *the community spouse's income*" to the

monthly need level. § 1396r-5(e)(2)(C) (2001) (emphasis added). In such instances, the statute directs the hearing officer to substitute for the standard resource allowance "an amount adequate to provide" any shortfall. *Id.* It is the meaning of this last provision that is presently before the Court.

E. The Development of the Income-First and Resource-First Rules

The statute does not expressly specify an order of priority for the allocations, transfers, and adjustments when both income and resources are available to protect the community spouse. This has led to some confusion when determining whether to increase the resource allowance under subsection (e)(2)(C). On its face, subsection (e)(2)(C) does not specify whether "community spouse's income" for these purposes encompasses both income attributable to the community spouse under subsection (b)(2)'s name-on-the-check principle and income transferable from the institutionalized spouse under subsection (d)(2), or whether it encompasses only the former.

The majority of states, like Wisconsin, have adopted an "income-first" approach whereby adjustments to the standard resource allowance in order to assure sufficient monthly income to the community spouse may only be made after taking into account any permissible income transfers from the institutionalized spouse. Other states apply a "resource-first" approach, whereby adjustments to the standard resource allowance are permitted whenever the standard resource allowance and income in the community spouse's own name together fail to generate the monthly need amount, without regard to any potential income transfer from the institutionalized spouse.

F. The Drafting History of Subsection (e)(2)(C)

The drafting history of subsection (e)(2)(C) is particularly illustrative of its meaning. Had Congress intended to mandate an automatic resource-first approach, it could have done so much more simply by avoiding the complex resource allocations set forth in subsection (f)(2) in favor of a standard rule defining the resource allowance as that amount needed to generate any shortfall between the monthly need and the income attributable to the community spouse under the name-on-the-check principle espoused in subsection (b)(2). Not only did Congress not do this, but it expressly rejected such a rule in favor of the hearing provisions at issue here.

Under the original House bill, H.R. 2470, 100th Cong. (1987), the only sources available to meet a community spouse's minimum monthly need were: income considered available to the community spouse under the name-on-the check principle, any income generated by the standard resource allowance, and any income transfers from the institutionalized spouse. The House version did not contain an option for increasing the standard resource allowance to meet the monthly need amount if the above three sources were inadequate. *See* H.R. Rep. No. 105(II) (1987), 100th Cong., 1st Sess., § 214, *reprinted in* 1988 U.S.C.C.A.N. 857, 892-95.

Senate bill 1127, although modeled after the House version, added a standard provision that would have automatically reduced those resources deemed available to the institutionalized spouse by the amount necessary to generate the minimum monthly need for the community spouse (after counting her "name-on-the-check" income), without regard to any income of the institutionalized spouse

that might be transferred for that same purpose. *See* 133 Cong. Rec. 29,429-30 (1987).[3] The bill achieved this result by defining the institutionalized spouse's "resources" as excluding those resources needed to produce the monthly need amount for the community spouse.[4] 133 Cong. Rec. 29,429-30 (1987).

Significantly, however, the Conference Committee did not accept either version. Unlike the House bill, it did provide for an adjustment to the resource allowance, if necessary, to increase the community spouse's income to the minimum monthly need level. But, unlike the Senate bill, it did not achieve this result by automatically "exclud[ing] from countable resources those assets necessary to produce income available to the community spouse . . . . " H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess. 264-67 (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1042-45. Instead, the Committee authorized the opportunity for a fair hearing embodied in subsection (e)(2)(C). *Id.* at 265, 1988 U.S.C.C.A.N. at 1043.[5] The conferees explained that in such

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[3] The original Senate MCCA bill, as reported by the Senate Finance Committee, did not contain a spousal impoverishment provision. That section was added by floor amendment sponsored by Senator Mikulski, and co-sponsored by Senators Mitchell and Kennedy. 133 Cong. Rec. 29,350-58 (1987).

[4] It also contained a provision granting a hearing to consider increasing either the monthly need allowance or the community spouse resource allowance, if they were otherwise inadequate to support the community spouse without financial duress.

[5] To effectuate this compromise, the conferees deleted from the Senate version's provision for a fair hearing the requirement of a showing of financial duress in order to increase the resource allowance. The distress showing was retained for requested

(continued...)

a hearing the state must allow the community spouse to retain an "adequate" amount of resources to provide the monthly need "*taking into account any other income attributable to the community spouse.*" *Id.* (emphasis added).[6]

The approach of the conferees is therefore directly at odds with the notion that subsection (e)(2)(C) mandates an

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increases in the monthly need amount. H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess. 266-67 (1988).

[6] A technical amendment made a few months later confirms Congress' intent that the resource adjustment not be automatic whenever the standard resource allowance fails to generate the monthly need amount. As originally enacted, the provision for an assessment of total resource value on request, contained in subsection (c) (1) (B) of the spousal impoverishment provisions, provided, in pertinent part:

> At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse has right [sic] to a fair hearing under subsection (e) (2) (E) *with respect to the determination of the community spouse resource allowance, to provide for an allowance* adequate to raise the spouse's income to the minimum monthly maintenance needs allowance.

But in a group of "technical" amendments to the MCCA, the italicized words were deleted. *See* Family Support Act of 1988, Pub. L. No. 100-485, § 608(d)(16)(A)(i), 102 Stat. 2343, 2417. The same amendments also corrected the grammatical error in the words "has right" appearing in bold face above by substituting "will have a right."

automatic resource-first approach. Had Congress intended to mandate a resource-first approach, it easily could have done so by adopting the language in the Senate bill. Instead, however, Congress adopted a compromise position whereby a hearing officer could increase the standard resource allowance, if necessary, "taking into account any other income attributed to the community spouse."

Congress's decision to place the resource allowance in a subsection providing for administrative hearings rather than in provisions defining standard allocations further indicates that it did not intend a mandatory resource-first approach. Rather, this placement demonstrates Congress's expectation that such cases would be exceptions to the standard rules and would require a more complex analysis than the simple formula contemplated in the Senate Bill. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 272 (1996) (drafting history is highly relevant in determining congressional intent regarding "discrete composition and separate placement" of certain subsections).[7]

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[7] One would assume that Congress would have set the standard resource allowance at a level that would cover most situations without resort to a fair hearing except in exceptional circumstances. Yet, if a mandatory resource-first rule were to apply, the maximum standard resource allowance would almost never be sufficient, except when a community spouse has a high level of income in his or her own name. But it was the very realization that this was often not the case that prompted the enactment of the spousal impoverishment provisions in the first place.

G. Agency Interpretation of Subsection (e)(2)(C)

The federal agency responsible for oversight of the Medicaid Act has also specifically rejected a mandatory resource-first approach.[8] Although it has not published formal regulations interpreting the spousal impoverishment provisions, it and the Secretary of HHS have stated consistently in policy memoranda and in letters that subsection (e)(2)(C) permits consideration of potential income transfers in determining whether the monthly need amount will be met. *Cleary*, 167 F.3d at 805. The agency interpretations in this regard are discussed in detail in the Petitioner's Brief.

II. THE STATUTE DOES NOT MANDATE A RESOURCE-FIRST APPROACH.

A. The Statute Is Ambiguous on This Question.

Every federal circuit court and state court of highest resort to have considered this issue has held that the statute is silent as to whether a hearing officer can consider potential income transfers in conducting the subsection (e)(2)(C) analysis. Taking the language of the statute, its drafting history and agency interpretations together, these courts have uniformly held that the income-first approach is a permissible one. *See id.* at 811; *Chambers*, 682 N.E.2d at 879; *Golf*, 697 N.E.2d at 558.

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[8] At the time of the agency guidance discussed herein, the agency within HHS responsible for oversight of the Medicaid program was the Health Care Financing Administration ("HCFA"). That agency is now called the Center for Medicare and Medicaid Services ("CMS").

Because the mandatory resource-first approach allows institutionalized spouses to qualify for Medicaid much more rapidly and allows community spouses to protect a larger -- in most cases, substantially larger -- share of a couple's resources, the permissibility of the income-first approach has been disputed intensely by advocates for the elderly. They contend that the words "the community spouse's income" in subsection (e)(2)(C) on their face refer only to income attributed to the community spouse under subsection (b)(2)'s "name-on-the-check" rule. As such, they argue that consideration of the drafting history and agency interpretations discussed above is impermissible. In the case presently on review, the Wisconsin Court of Appeals agreed with this view. As discussed below, this interpretation reflects a fundamental misunderstanding of the role of subsection (e)(2(C) in the statutory scheme.

B. The Statute Does Not Specify What Sources of Income May Be Considered in the (e)(2)(C) Analysis.

As an initial matter, the application of a "plain meaning" analysis to the Medicaid Act - - long recognized as one of the most impenetrable statutes ever conceived -- is close to oxymoronic. As this Court has recognized, the Act's "Byzantine construction" makes it "'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (2ndCir. 1976)). This is especially true of the spousal impoverishment provisions, which contain many interrelated provisions that make it difficult -- if not impossible -- to attach a plain meaning to any one sentence in isolation. Indeed, the differing views of the various courts and state agencies as to the meaning of subsection (e)(2)(C) strongly suggest that its meaning is far from plain. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996)

(stating that varying court interpretations suggest that the meaning of a word in a statute is ambiguous).

Even putting this aside, however, the language of the statute does not support a mandatory resource-first approach. As discussed above, the statute specifically contemplates numerous sources of income for the community spouse to meet his or her monthly need, including income transferable from the institutionalized spouse. Subsection (e)(2)(C), however, does not define "community spouse's income" as used therein, nor does it specify which sources of income to look to in determining whether the "community spouse's income" is adequate to meet the monthly need, nor does it cross-reference any other subsection of the statute from which to derive such a definition.

C. The Fact That Income Transfers Occur Post-Eligibility in No Way Precludes the Hearing Officer from Considering Such Future Transfers in the (e)(2)(C) Analysis.

Opponents of the income-first rule argue that the term "community spouse's income," as used in subsection (e)(2)(C), on its face excludes income transfers from the community spouse. The basis for their argument in this regard is that subsection (e)(2)(C) involves establishment of the resource allowance, which is a pre-eligibility determination, whereas income transfers occur post-eligibility. Because income transfers are not made until after eligibility is established, the argument goes, such transfers cannot be considered in the pre-eligibility calculation of the resource allowance. As evidence of this, proponents of a mandatory resource-first rule point to the fact that subsection (f) -- which governs transfer of resources -- provides for a pre-eligibility calculation of the resource allowance, whereas subsection (d) -- which governs transfers of income -- does not.

This argument ignores other provisions of the statute and fails to appreciate the role of subsection (e)(2)(C) in the overall statutory scheme. *See Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (in ascertaining plain meaning, a court must consider the language and design of the statute as a whole). The fact that income transfers do not occur until post-eligibility does not mean that the hearing officer may not *consider* such future transfers in determining whether it is necessary to raise the standard resource allowance in order to protect the community spouse adequately. After all, the hearing officer's very function in the (e)(2)(C) analysis is to make a forward-looking determination as to the financial situation of the community spouse *once the institutionalized spouse qualifies for Medicaid*. Indeed, while the hearing officer can set a higher resource allowance, the statute specifically provides that the resource allowance itself may not be *transferred* to the community spouse until *after* eligibility is established.

The resource allowance is nothing more than a pre-eligibility calculation, done in advance to ensure that resources are not overly depleted in qualifying the institutionalized spouse for Medicaid.[9] The community spouse's entitlement to a minimum monthly needs allowance -- the adequacy of which is subsection (e)(2)(C)'s focus -- also does not arise until after eligibility. Properly

[9] There is a common-sense explanation for why the income allowance, unlike the resource allowance, need not be calculated pre-eligibility. Whereas resources are a finite, depletable sum, sources of income typically recur monthly, or bi-monthly, whatever the case may be. There is therefore not the same concern that income would be completely depleted in qualifying the institutionalized spouse for Medicaid were a certain amount not protected in advance.

understood, the role of the hearing officer is to determine whether all of the sources from which that minimum monthly need is derived will be adequate when the time comes.

Put another way, subsection (e)(2)(C) allows the hearing officer to make a "snapshot" of the future to see if the standard allowances and allocations will be adequate to meet the community spouse's monthly need. This "snapshot" of the future by nature must be taken prior to eligibility while there are still additional resources available to cover any shortfall. Nothing in the statute, however, precludes the hearing officer in taking this "snapshot" from considering *all* post-eligibility sources of income contemplated by the statute -- *i.e.*, income automatically protected for the community spouse under the name-on-the-check principle (including income generated from the resource allowance) and income transfers. No purpose is served by recognizing only one of the two sources of income protected for the community spouse and ignoring the other. No matter what the outcome, the actual transfer of either income or resources would not be made -- and would not need to be made -- until after eligibility is established.

D. The Mandatory Resource-First Rule Renders the Standard Income Allowance Meaningless.

The mandatory resource-first approach also gives unduly short shrift to subsection (d) of the statute. Under the mandatory resource-first approach, an income transfer under subsection (d) would be necessary only in cases where at the time the spouse enters the institution (or first applies for Medicaid) the couple does not have enough resources to generate income to cover the shortfall between the monthly need and the income otherwise considered available to the community spouse. Yet, the text of subsection (d) demonstrates that the income transfer -- termed the "community spouse income allowance" -- was intended to

play an integral role in providing the community spouse's monthly need.

Most tellingly, the concept of the minimum monthly need is first introduced in the same subsection permitting the income transfer. The income transfer is itself *defined* as "the amount by which the minimum monthly needs allowance . . . exceeds . . . the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance)." 42 U.S.C. § 1396r-5(d)(2)(A)(B).[10] Even subsection (d)'s title -- "Protection of income for the community spouse" -- indicates that it is the primary vehicle for ensuring that a community spouse has enough income on which to live after the institutionalized spouse qualifies for Medicaid. Given this, it defies common sense to say that the detailed standard rules set out in subsection (d) -- an integral part of which is the very definition of the minimum monthly need -- would take a secondary role to a provision buried in the section of the statute devoted to individual adjustments to the standard allowances.

E. The "Name-on-the-Check" Rules Regarding the Availability of Income in Subsection (b)(2) Do Not Preclude Consideration of Income Transfers As Part of the (e)(2)(C) Analysis.

While proponents of the mandatory resource-first approach underplay the role of subsection (d), they overplay the role of subsection (b)(2). They contend that the term

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[10] The inclusion of the parenthetical in the above subsection further illustrates that Congress considered the income transfer to constitute income available to the community spouse for purposes of subsection (e)(2)(C).

"community spouse's income" in subsection (e)(2)(C) necessarily refers to income defined as attributable to the community spouse in subsection (b)(2) (the "name-on-the-check" principle). But subsection (b)(2) does not by its terms apply to allocation of resources, which is the focus of subsection (e)(2)(C). *Id.* Rather, subsection (b)(2) expressly states that the principles set forth therein apply only "in determining the income of an institutionalized spouse or a community spouse for purposes of the post-eligibility income determination described in subsection (d)." *Id.* at § 1396r-5(b)(2).

In other words, the rules which determine what income is considered available to the community spouse and the institutionalized spouse, respectively, under subsection (b)(2) are used solely to define that amount of income *automatically* protected for the community spouse in every instance (*i.e.*, income that is *per se* unavailable to offset the cost of the institutionalized spouse's care). Subsection (d)(1) then identifies an *additional* category of income that may be transferred to the community spouse for her protection, if needed, to meet any shortfall in the community spouse's minimum monthly need. As the Third Circuit correctly recognized in *Cleary*, this provision demonstrates that subsection (b)(2) does "not prevent allocation . . . of the institutionalized spouse's income for the needs of the community spouse." *Cleary*, 167 F.3d at 809.

F. The Permissibility of Either Approach Is Consistent With the Placement of (e)(2)(C) in the Fair Hearing Section of the Statute.

A mandatory resource-first rule also ignores the placement of subsection (e)(2)(C) within the fair hearing provisions of the statute and the import of the fair hearing process in the statutory scheme. *Id.* Subsection (e)(2)(A) permits a hearing if the spouses are dissatisfied with the calculation of any one of the five components that create the

income on which the community spouse must live post-eligibility: the income transfer, the income "otherwise" available to the community spouse under the name-on-the-check principle, the computation of the spousal share, the attribution of resources, and the resource allowance. *Id.* "The fact that the 'fair hearing' subsection . . . starts . . . with a recitation of the []components that make up the community spouse's income . . . indicate[s] that a revision of one of those components . . . should be made only with a consideration of the other four." *Id.* at 810.

Placement in a hearing context also suggests that circumstances involving this problem should be the exception to the rule. Under a mandatory resource-first approach, however, any community spouse without a large amount of income in his or her own name would have to seek a fair hearing in which the hearing officer's only role would be to apply a straightforward formula. One would expect, however that the more likely purpose for a hearing officer's involvement would be to find facts and exercise some discretionary judgment.[11]

G. The Income-First Rule Furthers the Twin Purposes Underlying the Statute.

Finally, the income first rule furthers the twin policies of the spousal impoverishment provisions "to prevent impoverishment of the community spouse," "but not to permit the sheltering of personal wealth at public expense."

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[11] For example, there may be atypical cases in which the institutionalized spouse's sources of income do not occur monthly or bi-monthly but rather are sufficiently uncertain and cannot reasonably be relied upon to provide for the community spouse's needs during the period of the institutionalized spouse's stay in the nursing home.

Golf v. New York Department of Social Services, 697 N.E.2d 555, 563 (N.Y. 1998). The spousal impoverishment provisions reflect a legislative balance of competing concerns. As such, they were "not intended to offer a financial boon for applicants or to provide a route upon which one could bypass the obligation to contribute one's fair share of the costs associated with nursing home care." *Id.* at 560. The income-first approach serves the goal of allowing the community spouse to "live comfortably" while also "protecting against the depletion of limited Medicaid resources by individuals capable of helping themselves." *Id.*

The chart below provides a useful illustration of the difference in a community spouse's financial situation under the prior law, under the income-first approach, and under the resource-first approach. It is based on facts present in the *Chambers* case in the Sixth Circuit. *See* 145 F.3d at 800, n.12.

ILLUSTRATION OF A SAMPLE COUPLE'S FINANCIAL SITUATION.	Pre-1990	Post -1990	
		Income First	Resource First
Initial Resource Allocation:			
Total Resources	$169,655	$169,655	$169,655
CS' Resource Allocation	n/a	$72,660	$72,660
IS' Resource Allocation	$169,655	$96,995	$96,995
Determining CS' Monthly Income Deficiency:			
Monthly Needs Allowance	n/a	$1,230	$1,230
Less CS' Monthly Income	$417	($417)	($417)
Less Monthly Income Off CSRA at 6% Interest	n/a	($363)	($363)
Equals CS' Monthly Income Deficiency	n/a	$450	$450
Satisfying The Monthly Income Deficiency:			
Monthly Income Transfers (From IS' $857 Soc. Sec.)	$165	$450	$0
CSRA Enhancement	n/a	$0	$90,000
End Result:			
Total Protected Resources	$0	$72,660	$162,660
Resources Required to be Expended Prior to Eligibility	$169,665	$96,995	$6,995
Total CS Income Post-Eligibility	$582	$1,230	$1,230

As the above chart illustrates, application of a mandatory resource-first rule, especially in circumstances involving a community spouse with little or no income on which to live, would permit the routine transfer of hundreds of thousands of dollars over and above the standard resource allowance and would enable institutionalized spouses to qualify for Medicaid very soon after institutionalization, if not immediately. *Id.* While such a result might be thought desirable in an ideal world -- and some states do apply it -- states should not be forced to adopt this approach without unambiguous direction from Congress or the state legislature. *Id.*[12] The spousal impoverishment provisions do not provide that unambiguous direction. Any change that might require States to open their Medicaid programs to those in the middle-class is a decision that properly should be made in a legislative, not a judicial, forum.

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[12] Opponents of the income-first rule argue that in certain situations a community spouse may not have a guaranteed source of income to meet the monthly need if the institutionalized spouse predeceases the community spouse. As an initial matter, the most common sources of income typically transfer over to the surviving spouse. Moreover, even if income available to a community spouse does decrease somewhat upon the institutionalized spouse's death, the community spouse is not left destitute. Rather, the community spouse still has access to the standard amount of resources, any income in his or her own name, and any survivor income and benefits of the institutionalized spouse. This is far more than he or she would have been left with under prior law. The imposition of a mandatory resource-first rule would vastly overcompensate for the perceived problem.

CONCLUSION

For the foregoing reasons, the amici states respectfully urge the Court to reject a mandatory resource-first interpretation of 42 U.S.C. § 1396r-5(e)(2)(C), and to hold that the income-first approach applied by the many states is a permissible interpretation of the statute.

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IN THE

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH
AND FAMILY SERVICES,
Petitioner,

v.

IRENE BLUMER,
Respondent.

On Writ of Certiorari to the Wisconsin Court of Appeals District IV

BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether spouses are entitled to an upward adjustment in the amount of resources they can protect as part of a "community spouse resource allowance" even though a state will make a sufficient amount of existing marital income available to the community spouse to ensure that the community spouse's monthly income allowance will meet the state-set minimum monthly maintenance needs allowance after, and while, Medicaid eligibility attaches.

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INTEREST OF *AMICUS CURIAE* AMERICAN HEALTH CARE ASSOCIATION

The American Health Care Association ("AHCA") respectfully submits this *amicus curiae* brief pursuant to Sup. Ct. R. 37 in support of reversal of the Wisconsin Court of Appeals' June 8, 2000 decision in *Blumer* v. *Wisconsin Department of Health and Family Services*, 237 Wis. 2d 810, 615 N.W.2d 647 (2000).[1] AHCA is a private, voluntary, nonprofit federation of 51 affiliated state associations representing more than 11,000 non-profit and proprietary long term care (nursing home) providers. AHCA representation encompasses about two-thirds of the nation's 16,000 nursing homes, most of which provide nursing facility services to Medicaid-eligible beneficiaries under state Medicaid programs.

As a result of the landmark nursing home reforms of the Omnibus Budget Reconciliation Act of 1987 ("OBRA 1987"), P.L. 100-203, nursing homes that enter into provider agreements with the Secretary of the Department of Health and Human Services ("HHS") to participate in the Medicare and/or Medicaid programs must meet numerous federal standards governing the provision of long term care services. The ultimate goal ascribed to these standards is to ensure that nursing homes furnish the "highest practicable" level of care to their residents. *See* 42 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. Part 483. Meeting the federal standards requires clinical expertise, teamwork and dedication from a variety of health care professionals and nursing home staff. It also requires substantial financial outlays. AHCA, the largest national trade association representing long term care providers, is committed to assisting its members in achieving OBRA

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[1] Both parties consented to the filing of this brief; copies of letters reflecting the parties' written consents are attached to the Certificate of Service. No part of this brief was authored by counsel for either party and reimbursement for the costs associated with preparation and submission of this brief came exclusively from AHCA.

1987's goals through, among other things, advocacy of financial policies and statutory and regulatory regimes designed to ensure that adequate funding is available to cover the costs that long term care facilities incur in meeting the needs of the residents they serve.

Because the commercial insurance market for long term care coverage is fairly undeveloped, long term care facilities must recoup their costs primarily through the Medicare and Medicaid programs or private-pay arrangements with individuals. But Medicare coverage is temporary and Medicaid payments are significantly restricted. Thus, nursing homes must ensure that their operating costs are met by balancing any public program reimbursement they receive against revenue they can obtain from private-pay sources.

A "resource first" approach dries up the crucial private-payor source of revenue for long term care facilities while increasing the financial burdens placed on state Medicaid programs by accelerating a married applicant's eligibility for Medicaid. Essentially, it deems resources that would have been available to help finance health care off-limits even though sufficient marital income exists to ensure that the spouse not on public assistance is not impoverished.

SUMMARY OF THE ARGUMENT

The issue in this and similar cases is generally framed as whether 42 U.S.C. § 1396r-5(e)(2)(C) mandates what has commonly been termed a "resource first" approach to rectify a deficient minimum monthly maintenance needs allowance ("MMMNA") under the Medicaid statute's so called "spousal impoverishment" provisions. But essentially, the issue is one of ripeness, specifically: whether spouses have any "fair hearing" right to increase the community spouse resource allowance ("CSRA") under 42 U.S.C. § 1396r-5(e)(2)(C) where they cannot demonstrate that a community spouse's post-eligibility monthly income will fail to meet the state-set MMMNA level. The Wisconsin Court of Appeals determine-

ed that the spouses involved in the appeal before it were permitted a resource adjustment only after the court first deemed "unavailable" marital income that would in fact be available when needed to supplement a community spouse's income allowance.

According to the Wisconsin Court of Appeals, 42 U.S.C. § 1396r-5(e)(2)(C) "very specifically directs the increase of the [CSRA] to an amount sufficient to generate additional income to meet the [community spouse's MMMNA]." *Blumer*, 615 N.W.2d at 653. And even though the appeal provision contemplates that a community spouse's monthly income will first fall below the state's MMMNA, the Wisconsin Court decided that "[b]ecause § 1396r-5(d) (relating to the transfer of income) is limited to post-eligibility determination transfers, while increasing the CSRA pursuant to § 1396r-5(e)(2)(C) is not so limited, then increasing the CSRA via resources is the only method by which *a community spouse can be afforded more income for the MMMNA at the time MA [Medicaid] eligibility is being determined for the institutional spouse*." *Id.* (emphasis added). The court erases marital income that actually exists, and will be available to the community spouse after Medicaid eligibility attaches, from calculations that are intended to determine what the community spouse's monthly income will be after eligibility attaches by deeming the institutional spouse's income off-limits before eligibility attaches.

The court's analysis is fundamentally flawed. The court assumes that a community spouse somewhere gains a right to be afforded a minimum income stream from marital assets before Medicaid eligibility attaches. The court fails to recognize that a minimum income level is protected only after eligibility attaches. This truism should have been apparent to the court from placement of the income allowance provisions within a section that operates post-eligibility and the discussion in the legislative history. But by interpreting the spousal impoverishment provisions from back to front,

the court manages only to turn the intent of the Medicaid Act upside down. From the fact that income transfers from an institutional spouse to a community spouse are only discussed in a post-eligibility provision, it gleans a non-existent pre-eligibility rule restricting how income may then be used. What the court fails to grasp is that Medicaid has no anti-deeming provisions that apply to marital income before eligibility attaches. In fact, aside from requiring that pre-eligibility asset transfers be for fair market value, Medicaid places no pre-eligibility restrictions on how income may be used. Only after eligibility attaches does Medicaid confront how income attributed to the eligible individual may be used.

Post-eligibility, Congress explicitly contemplated only that income attributed to the community spouse would be off-limits to Medicaid. But Congress explicitly allowed states, in cases where the community spouse's protected income was not sufficient to meet the allowable monthly minimum, to make income that the couple otherwise would have been required to spend on the institutional spouse's Medicaid program costs available instead for use by the community spouse. Where, after eligibility attaches, a state will make marital income available to a community spouse before it applies any remainder to the costs of health care, the statute does not contemplate that available marital income can be ignored so that the predicate for a CRSA adjustment—demonstration that a post eligibility income stream will be inadequate—can be found.

The Wisconsin Court of Appeals misconstrues the statute, and then, upon deciding that its construction is clear, ignores conflicting views in the legislative history and from the agency authorized to administer the program. By inferring a pre-eligibility right to receipt of a particular income level, the court eliminated a right that Congress left to the states to decide how a community spouse income allowance might be funded when required.

ARGUMENT

A. Background

1. Decisions Below

In 1996, two years after respondent Irene Blumer was admitted to a nursing home, her husband, who continued to live in the community, applied for Medicaid on her behalf. Income attributable to Irene Blumer did not disqualify her from Medicaid eligibility after her costs of medical care were considered. Consequently, the only eligibility issue was whether overall marital resources exceeded, by more than $2,000,[2] the value of Mr. Blumer's "CSRA."[3]

Irene Blumer's application showed that the couple's marital assets totaled $145,644 when Irene Blumer became institutionalized in 1994. The reviewing agency determined that Wisconsin's spousal impoverishment rules permitted the couple to shield a CSRA of $72,822 for Mr. Blumer (in this case half the marital total), plus $2,000 that can be protected for his institutionalized spouse. As of the date of respondent's Medicaid application, however, the couple retained marital assets totaling $89,335, or $14,513 more than the eligibility threshold permitted. Her application was rejected. *Blumer*, 615 N.W.2d at 648.

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[2] Federal and Wisconsin laws disqualify institutional spouses with more than $2000 in liquid assets. *See* 20 C.F.R. § 416.1205; Wisc. Stats. § 49.47(4)(b)(3g)(e).

[3] If they did, Section 1902(a)(17) of the Social Security Act (42 U.S.C. § 1396a(a)(17)) and related provisions under state law would continue to disqualify the spouse from Medicaid until the excess marital resources were exhausted. Except to require that assets be exhausted for fair market value, Congress does not tell couples how to spend assets before eligibility attaches. As a practical matter, however, while a spouse continues to reside in a nursing home, costs of nursing care will consume additional income and resources until overall assets fall to a level where Medicaid eligibility attaches.

Respondent pursued an appeal through the "fair hearing" provisions of Section 1924(e)(2)(C) of the Social Security Act (42 U.S.C. § 1396r-5(e)(2)(C)). She contended that she and/or her community spouse should not be required to exhaust $14,513 in additional assets before she qualified for Medicaid. According to Irene Blumer, those marital assets attributed to her were also subject to shelter within an expanded CSRA to which Mr. Blumer was entitled because the income attributed to him fell below Wisconsin's MMMNA. *Id.* at 648-649.

At the hearing, respondent demonstrated that the monthly income attributable to Mr. Blumer was $1,702.45 (including his social security, an annuity, and $377.85 derived from his $74,822 resource allowance). Because that amount fell $25 below the MMMNA then in effect, she asserted that Mr. Blumer should be able to raise his CSRA. Before adjusting the amount of protectible assets, however, the examiner applied the income-first rule in Wis. Stat. § 49.455(8)(d). In effect, the examiner determined that sufficient marital income existed, and would continue to exist, to make up the $25 shortfall, because, while Irene Blumer remained on Medicaid, Wisconsin's Medicaide Program made some of her $1162.71 in monthly income available to her husband. *Id.*

The Wisconsin Court of Appeals overturned the manner by which Wisconsin guaranteed Mr. Blumer's income allowance. It concluded that Wisconsin's income-first statute violated federal law. *Id.* at 655. The Court of Appeals based this determination on its view that the CSRA adjustment occurs during a pre-eligibility determination process, while the provision explicitly permitting the use of an institutional spouse's income to supplement any shortfall in community spouse's income allowance is set forth in a post-eligibility provision. *Id.* at 653.

The Wisconsin Supreme Court denied review.

2. Medicaid Eligibility and Income Protection Under the Spousal Impoverishment Provisions

The Medicaid program is fundamentally a needs-based welfare program for the poor. As this Court noted in *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982):

> In establishing public assistance programs, Congress often has determined that the Federal Government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both federal and state funds for such assistance are limited. In structuring the Medicaid program, Congress chose to direct those limited funds to persons who were most impoverished and who—because of their physical characteristics—were often least able to overcome the effects of poverty. . . . It is rational to distribute public assistance benefits on the basis of the income and resources available to potential recipients.

An individual's eligibility for Medicaid requires testing both income and resources. Under the income eligibility provisions of Section 1902(f) of the Social Security Act, 42 U.S.C. § 1396a(f), a state participating in Medicaid may not exclude an individual on the basis of his or her income if income does not exceed thresholds calculated after deducting the expenses that individual incurs for medical care. But even though medical expenses may ensure that excess income does not exist to disqualify an individual, Section 1902(a)(17) of the Social Security Act permits states to exclude individuals with assets in excess of eligibility thresholds, until such excess assets are exhausted. *See* 42 U.S.C. § 1396a(a)(17).

The spousal impoverishment provisions at issue here did not change the eligibility thresholds applicable to an institutional spouse. Instead, the provisions revised how marital income and assets would be attributed to institutional spouses for eligibility purposes and protected after eligibility attached.

Prior to the enactment of 42 U.S.C. § 1396r-5 in 1988, rules governing Medicaid eligibility of an institutionalized spouse did not allow for much financial protection of the needs of the spouse who remained in the community. This was the case because Medicaid eligibility rules assumed that most or all of a couple's marital income and resources could and should be dedicated to the cost of caring for the institutionalized spouse. Medicaid regulations initially permitted the protection of a very limited amount of income for a community spouse's needs. *See, e.g.*, 42 C.F.R. § 435.700 *et seq.* (1980). At the same time, most of the couple's joint assets, and any assets owned solely by the institutional spouse, were deemed available for the cost of that spouse's care. In essence, the eligibility rules governing married couples forced such couples to liquidate nearly all of their joint assets in order to qualify one of the spouses for Medicaid. As a result, the community spouse frequently was left with no resources. Moreover, even after assets were expended and eligibility had attached, most of the couple's marital income had to be used to offset the cost to Medicaid of the nursing home care it now subsidized. *See* H.R. Rep. No. 105(II) at 65-67, *reprinted in* 1988 U.S.C.C.A.N. at 888-890.

At the same time, however, couples often avoided paying for institutional care of the institutionalized spouse by simply transferring their joint assets to the community spouse where they would be deemed, under principles then in effect, unavailable to the institutional spouse. *See id.* at 73, 1988 U.S.C.C.A.N. at 896.

Through enactment of the spousal impoverishment provisions (and transfer restrictions), Congress sought to address *both* of these problems. As indicated in the House Energy and Commerce Committee Report, "The purpose of the Committee bill is to end this pauperization by assuring that the community spouse has a sufficient—*but not excessive*—amount of income and resources available to her

while her spouse is in a nursing home at Medicaid expense." *Id.* at 65, 1988 U.S.C.C.A.N. at 888 (emphasis added).[4]

The protection afforded the community spouse by Congress was clearly limited. First, as is plain from the language of the statute, the community spouse generally is only entitled to "shelter" a *portion* of marital income (*i.e.*, income attributed to the community spouse or made available to that spouse to meet the MMMNA) and marital resources (*i.e.*, the CSRA) from Medicaid "spend down" and exhaustion requirements. 42 U.S.C. § 1396r-5(c)(2). Thus, while providing the community spouse with a minimum level of resources, this limitation also ensures that "no one escapes contributing a fair share to nursing home care costs." 133 Cong. Rec. H6453 (daily ed. July 22, 1987) (statement of Rep. Tauke). Second, the committee report language quoted in the previous paragraph makes it equally clear that the income protection afforded the community spouse through the MMMNA applies *only during the period of Medicaid eligibility*. Indeed, once an institutionalized spouse no longer requires institutional care (*e.g.*, upon discharge or death), his or her spouse ceases to qualify as a "community spouse" under the statutory definition. *See* 42 U.S.C. § 1396r-5(h)(2).[5]

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[4] In addition to the spousal impoverishment provisions requiring application of marital resources toward the cost of institutional care, Congress simultaneously enacted provisions that limit couples' ability to transfer assets to the community spouse or their children to avoid applying those assets to the cost of health care. *See* 42 U.S.C. § 1396p. In enacting these separate restrictions as part of the same statutory section that included the spousal impoverishment provisions, Congress noted that "an entitlement program for the poor should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." H.R. Rep. No. 105 at 73, *reprinted in* 1988 U.S.C.C.A.N. at 896. *See also infra*, Section C.

[5] For this reason, the Court of Appeals' apparent concern that an income first approach could leave the community spouse with income less

Under the spousal impoverishment provisions of the Medicaid statute, when a married individual enters a nursing facility that participates in Medicaid, the facility resident and his spouse are entitled to a notice of the resident's right to apply for Medicaid and of the couple's right to an assessment of their resources. 42 U.S.C. § 1396r-5(c)(1)(B). This assessment ultimately is used to determine whether, and, if not, what must occur before, the institutionalized spouse is eligible for Medicaid. In conjunction with the eligibility assessment, the provisions address the existence, if any, of a share of marital income and resources that historically might have disqualified the institutional spouse from Medicaid but which will no longer be deemed "available" to the institutional spouse to cover the costs of medical care. 42 U.S.C. § 1396r-5.

With respect to the eligibility assessment, the provisions establish new rules regarding the attribution and availability of marital income and resources between the institutionalized spouse and the community spouse. With respect to income attribution, the statute basically incorporates a "name on the check" principle which deems income payable to either spouse "available" only to that spouse. If income is payable to both spouses, it is generally divided evenly between the two spouses. 42 U.S.C. § 1396r-5(b)(2).

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than the MMMNA upon the death of the institutionalized spouse (insofar as the community spouse's revised Social Security payments may be less than the couple's aggregate Social Security payments), *Blumer v. Wisconsin Department of Health and Family Services*, 237 Wisc. 2d 810, 615 N.W. 2d 647, 654 (2000), is misplaced. Upon the death of the institutionalized spouse, the community spouse is simply not entitled to continue to receive an MMMNA. Moreover, it is equally possible that the community spouse's "direct" income may exceed the MMMNA, or that income from other sources (like insurance) will come into play. Further, in cases in which it does not, community spouses would still have the "principal" amount of the "standard" CSRA (as well as their home, personal effects, and an automobile) available to meet their needs.

In contrast, with respect to resource attribution, the name on the title is irrelevant. Instead, the statute initially evaluates the value of all marital resources that were available to the couple when the institutionalized spouse's need for institutional care began. *Id.* § 1396r-5(c)(1)(A). In computing the marital resources potentially available to the institutionalized spouse, however, the value of the couple's home, personal effects, and automobile, among other things, is disregarded. *Id.* § 1396r-5(c)(5). *See id.* § 1382b.

Within the statute's income and resource attribution sections are rules for determining how much of the marital income and resources may be considered "available" to the institutionalized spouse for Medicaid eligibility purposes—or, on the flip side, unprotectible. With respect to income, the statute prevents disqualification on the basis of any income attributed to the community spouse. Specifically, 42 U.S.C. § 1396r-5(b)(1) provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." Essentially, all marital income is deemed available to the institutional spouse, *except* what is deemed available only to the community spouse.

Similarly, all of the countable marital resources (resources not specifically excluded from attribution under subsection (c)(5)) are considered available to the institutionalized spouse, *except* for an additional CSRA. *Id.* § 1396r-5(c)(2). The CSRA is the greatest of: (i) $12,000 (adjusted for inflation) or, if a greater amount is specified under a state plan, that amount (but not to exceed $60,000 before inflation adjustment); (ii) the lesser of the "spousal share" [6] or $60,000 (adjusted for inflation); (iii) an amount established pursuant to a fair hearing; or (iv) an amount specified by a court order

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[6] The "spousal share" is fifty percent of the total "countable" marital resources. *Id.* § 1396r-5(c)(1)(B).

for support. *Id.* § 1396r-5(f)(2).[7] After the institutionalized spouse is determined to be eligible for Medicaid, he or she may transfer to or for the sole benefit of the community spouse an amount necessary to ensure that the community spouse retains his or her CSRA without violating 42 U.S.C. § 1396p(c)(1)(A)'s prohibition against asset transfers for less than fair market value. *Id.* § 1396r-5(f)(1).

In addition to crafting new marital asset attribution rules for spousal eligibility determinations, the statute is also designed to provide a limited amount of financial protection for the community spouse. As noted above, the statute already allows the community spouse to retain the couple's home, automobile and personal effects; newly protects additional marital resources within a CSRA; and also shields income attributed to the community spouse from being deemed available to the institutionalized spouse to pay for his or her health care costs. These assets and income already protected for the community spouse may be sufficient for that spouse to live on while his or her spouse remains on Medicaid. But to ensure that the protected combination of income and resources suffice, and that if they do not, additional marital income and resources are also made available for the community spouse's benefit, Congress required each state to establish a MMMNA. The MMMNA for the community spouse can vary from state to state but must equal at least 150% of the federal poverty level while not exceeding $1,500 per month (before adjustment for inflation). 42 U.S.C. § 1396r-5(d)(3). The MMMNA operates to guarantee a minimum monthly income to the community spouse (assuming that the couple has sufficient income and assets to generate the MMMNA) while the institutional spouse remains institutionalized on Medicaid.

[7] During the period relevant to this appeal, the maximum "standard" CSRA in Wisconsin was $76,740.

In the event that income directly attributable to the community spouse is less than the MMMNA, the statute provides that "there shall be deducted" from the institutionalized spouse's monthly income, a "community spouse monthly income allowance . . . , but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse." *Id.* § 1396r-5(d)(1)(B). In other words, if the community spouse's monthly income falls below the MMMNA, a state Medicaid program may apply income available to the institutionalized spouse, which under the old rules the state was permitted to apply entirely to offset Medicaid's costs, instead to offset the community spouse's income shortfall.

In some cases, however, the combination of income deemed available only to the community spouse and income deemed available to the institutionalized spouse that is made available to the community spouse may still be insufficient to meet the MMMNA. In those circumstances, the statute provides in a separate subsection for fair hearings at which either spouse may request an increase in the "standard" CSRA by an amount necessary to generate sufficient income to make up any shortfall in the monthly income allowance. The fair hearing provision, which is the basis for the claim here, states as follows:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(C).

B. The Court of Appeals' Pre-Eligibility Exclusion of Marital Income as One Means for a State to Ensure that the MMMNA is Met is Wrong Because the MMMNA is a Post-Eligibility Income Protection Provision that Congress Expressly Indicated a State Could Fund Using Income that was Made Available After Medicaid Eligibility Attached.

As described above, the Medicaid statute clearly authorizes both income transfers and resource transfers to enable a community spouse to realize his or her MMMNA. *See* 42 U.S.C. §§ 1396r-5(d), (e)(2)(C). Significantly, whereas the statute broadly provides that no income of the community spouse may be attributed to the institutionalized spouse in 42 U.S.C. § 1396r-5(b)(1), there is no converse limitation precluding attribution of the institutionalized spouse's income to the community spouse.

The issue in this case relates solely to the *order* in which various potential sources of marital income may be applied to make up the community spouse's MMMNA. Essentially, there are four potential sources of marital income from which the community spouse may draw a post-eligibility income sufficient to meet the MMMNA: (i) income directly attributable only to the community spouse; (ii) income generated from the community spouse's CSRA; (iii) income attributable to the institutionalized spouse and made available to the community spouse (during the period when the community spouse has a right to protect a monthly income allowance); and (iv) income generated from resources attributable to the institutionalized spouse that are transferred to the community spouse as part of an adjustment to the CSRA pursuant to a fair hearing. The parties agree that income from categories (i) and (ii) cannot be disregarded and must be applied first when calculating the sufficiency of a community spouse's income. Respondent and the Wisconsin Court of Appeals contend that, if there still is a shortfall after that application,

the statute mandates that income from category (iv) must be applied next under a "resource first" approach, before income from category (iii) may be applied (if at all).

The Wisconsin Court of Appeals held that income from resources (category (iv)) must be made available first because Congress did not intend income attributed to the institutionalized spouse to be factored into the MMMNA calculations before eligibility attaches. *Blumer*, 615 N.W.2d at 651-652. According to the Wisconsin court, income that may be available post-eligibility is irrelevant to calculations that are necessarily being performed before eligibility attaches because the statute only discusses supplementing a community spouse's income allowance with income attributed to the institutional spouse in a, provision that applies *after* eligibility for Medicaid attaches. *Id.* at 653.

In actuality, the entire statute focuses on the post-eligibility period. Resource transfers also occur only *after* eligibility attaches. *See* 42 U.S.C. § 1396r-5(f)(1). There is no mystery behind Congress' discussion of both income and resource transfers from an institutional spouse's marital assets only after eligibility attaches. Medicaid provides no guarantee that sufficient marital income will be made available to a community spouse before eligibility occurs. The community spouse monthly income allowance is exclusively a post-eligibility protection.

Medicaid's concern with the post-eligibility period here is entirely consistent with how Medicaid otherwise operates. Medicaid places only one restriction on how any individual who may become eligible for Medicaid (or the spouse), but is not yet eligible, may choose to spend assets. If assets (defined to include "income" and "resources" under 42 U.S.C. 1396p(e)) are transferred for less than fair market value within certain pre-eligibility windows, eligibility may be postponed. *See* 42 U.S.C. § 1396p(c)(1)(A). Income (and resource transfers) are discussed post-eligibility—not because

Congress somehow intended to elevate the significance of resources—but because, except as provided in Section 1396p, until Medicaid starts paying, Medicaid laws do not regulate how spouses may share marital income and resources.

Even though the Medicaid program does not tell married couples where they may spend any income before either becomes Medicaid-eligible, the Wisconsin Court of Appeals assumes into the Medicaid program a community spousal right to collect a MMMNA, before eligibility attaches, from assets of an institutionalized spouse. Based on a premise that there is payment right before an eligibility determination, and based on Congress' discussion of income transfers only post-eligibility (where they belong), the court decides that "increasing the CSRA via resources is the only method by which a community spouse can be afforded *more income at the time MA eligibility is being determined* for the institutional spouse." *Blumer*, 615 N.W.2d at 653 (emphasis added).

In truth, there exists no right under the Medicaid Act to "more income at the time MA eligibility is being determined." The spousal impoverishment provisions nowhere contemplate any pre-eligibility income allowance payment. Instead, establishment and payment of a "community spouse income allowance" is detailed within a subsection that discusses what will occur "[a]fter an institutionalized spouse is determined or redetermined to be eligible for Medical assistance," and which—even begins with the words: "ALLOWANCES TO BE OFFSET FROM INCOME OF INSTITUTIONAL SPOUSE." 42 U.S.C. § 1396r-5(d)(1) & (2). Next, within the same subsection and immediately following the provisions establishing the potential right to protect an income allowance, Congress defines the MMMNA. It then becomes the basis for determining whether payment of a allowance from any marital assets will occur. *See* 42 U.S.C. § 1396r-5(d)(3).

In sum, the spousal impoverishment provisions protect a MMMNA only after eligibility attaches and, then, only while eligibility continues. Consequently, there is no legal basis for concluding that institutional spouse income that will be in existence after eligibility attaches, and that will be made available to supplement the allowance payment at the time that the payment "becomes due," may not factor into eligibility calculations. Income that will be available when a state is obligated to protect an income allowance need not be ignored.[8]

Some courts have suggested that even though the community spouse is entitled to protect an income level up to the MMMNA *after* the institutionalized spouse becomes eligible for Medicaid, the statutory authorization for an adjustment to the CSRA under subsection (e)(2)(C) would be rendered

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[8] The Wisconsin Court of Appeals also found significant the fact that "the community spouse's income," as used in subsection (e)(2)(C), is never defined to mean "the couple's income or the community spouse's income plus the institutionalized spouse's income." *Blumer*, 615 N.W.2d at 653. That hardly gives the court license to transform the phrase "the community spouse's income" into the phrase "the income the community spouse receives from the CSRA to a level that meets the MMMNA." The spousal impoverishment provisions provide that, "[except as [Section 1924 of the Act] specifically provides [it] does not apply to . . . the determination of what constitutes income or resources[.]" 42 U.S.C. § 1396r-5(a)(3). The income attribution principles from which the court gleans a basis for subtracting any pre-eligibility income attributed to the institutional spouse also do not operate to control how income is marital income is distributed pre-eligibility. Rather, the income attribution principles explicitly involve only "determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in [the post-eligibility income allowance provisions of] subsection (d)[.]" 42. U.S.C. § 1396r-5(b)(2). At a minimum, because the Secretary administers the Act and is authorized to prescribe standards in the area of what constitutes income, 42 U.S.C. § 1396a(a)(17), the court should have looked at agency guidance before writing its own definition. *See, e.g., Cleary* v. *Waldman*, 167 F.3d 801, 807 (3rd Cir. 1999).

meaningless in the post-eligibility context under an income first approach because the couple's resources already would have been spent by the institutionalized spouse. That suggestion ignores the fact that nothing in the statute precludes an assessment and allocation of income at the pre-eligibility stage (as was done in this case) to ensure that, post-eligibility, the MMMNA can be met. Indeed, as the district court found in *Cleary*, the income and resource attribution may occur together at a pre-eligibility assessment (and, if necessary, at a hearing) to *preserve* a community spouse's ability to realize the full MMMNA by ensuring that an appropriate amount of resources are available prior to spend down if the community spouse's income and any transferred income from the institutionalized spouse will be insufficient to make up the MMMNA. *Cleary v. Waldman*, 959 F. Supp. 222, 232 (D.N.J. 1997), *aff'd* 167 F.3d 801 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999).

In context and sequentially applied, the spousal impoverishment eligibility and income protection rules make sense. Their application to the facts here demonstrates that the eligibility determinations Wisconsin made were accurate and appropriate. Essentially, Wisconsin provided a pre-eligibility right to appeal in order to ensure protection of a post-eligibility allowance. But recognizing that the allowance attaches post-eligibility, and that sufficient income would be made available at that time to fund the community spouse's income allowance, Wisconsin appropriately denied the request to adjust the CSRA. Federal law countenances exactly what Wisconsin allowed.[9]

[9] Indeed, the basic income protection afforded the community spouse through the MMMNA and through payment of a "community spouse monthly income allowance" is established in subsection (d) of 42 U.S.C. § 1396r-5. The authority for income transfers to enable the community spouse to achieve the MMMNA is contained in that same section. The

C. Wisconsin's Approach To Implementing 42 U.S.C. § 1396r-5 Is Consistent With the Medicaid Program's "Core Value" Of Individual Responsibility For Health Care Costs and with Congressional Enactments that Control Asset Transfers Intended to Expedite Program Eligibility

Mandating a resource first approach to the spousal impoverishment provisions would frustrate a Congressional goal of allowing each state to control Medicaid eligibility, in part, by establishing its own "standard" CSRA. An income deficiency could be temporarily "manufactured" by subtracting from available marital assets income that would have been sufficient to meet the MMMNA once it became payable. Thereafter, couples routinely would be permitted to seek a transfer of marital resources in an amount that exceeded the state's standard statutory CSRA ceiling in order to generate sufficient income (coupled only with the community spouse's "attributed" income) to guarantee the community spouse a MMMNA for life. Nothing in the statute or its legislative history suggest that Congress intended to impose on states the obligation to create lifetime "trusts" that would assure streams of income to community spouses. Instead, as noted above, the income protections of the spousal impoverishment provisions were intended to apply only when Medicaid was paying for the institutional care.

Notably, in enacting the spousal impoverishment provisions, Congress rejected a proposal to require that the MMMNA be fully funded through a resource transfer in a manner similar to the resource first approach embraced by the Wisconsin court. The initial House Bill in 1988 did not provide for an adjustment to resources to meet the MMMNA. The Senate Bill (S.1127), by contrast, allowed for a broad

proximate placement tends to suggest that Congress viewed income transfers as the primary means for resolving MMMNA shortfalls.

exclusion from countable resources of amounts necessary to meet the MMMNA. But the Conference Committee rejected the Senate's broad approach to protecting additional resources. *See Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 803-804 (6th Cir. 1998); *Cleary*, 167 F.3d at 811.

Moreover, Congress continually has emphasized, outside of the specific context of the spousal impoverishment provisions, that individual responsibility for health care expenses prior to Medicaid eligibility remains a paramount public policy if the Medicaid program is to be preserved as a poverty-based program. The primary method of assuring that the program is available only to the most needy has been through restrictions on transfers of assets in order to secure Medicaid eligibility. *See* 42 U.S.C. § 1396p.

In 1980, Congress enacted a rule permitting states to deem a person ineligible for Medicaid for up to 24 months if he or she transferred assets for less than fair market value to become Medicaid eligible. *See* Omnibus Reconciliation Act of 1980, P.L. 96-611, § 5, 94 Stat. 3567. Congress expanded the assets subject to these restrictions as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), P.L. 94-248. As noted earlier, Congress tightened these rules even further in conjunction with the enactment of the spousal impoverishment provisions by mandating the transfer of assets rule and expanding the ineligibility period. *See supra* note 4. Congress again closed loopholes in the asset transfer prohibitions in 1989 and 1993. *See* Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, § 6411(e); Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, § 13611. Finally, as part of the recent Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), P.L. 104-191, Congress enacted federal *criminal* penalties for improper transfers of assets for the purpose of qualifying for Medicaid. HIPAA, § 217. *See* 42 U.S.C. § 1320a-7(b)(a)(6).

Finally, recent federal legislation provides incentives for individuals to avoid the potential for impoverishment while simultaneously protecting assets through the purchase of a long term care insurance policy. Specifically, as part of HIPAA, Congress sought to expand the use of long term care insurance by providing tax incentives for individuals to purchase appropriate coverage, as well as minimum standards for such policies. *See* HIPAA, P.L. No. 104-191, § 321. HIPAA excludes amounts received under qualifying policies from gross income, and individuals may deduct unreimbursed expenses and premium costs as medical expenses. In enacting these provisions, Congress once again sought to provide incentives for individuals to take financial responsibility for their long term care needs. *See* H.R. Rep. No. 496 at 115, *reprinted in* 1996 U.S.C.C.A.N. at 1916.

D. An Income First Approach Is Consistent With A Permissible Federal Interpretation Of the Spousal Impoverishment Provisions By the Agency Empowered to Administer the Medicaid Program

The language, structure, legislative history and public policies underlying the Medicaid program confirm that an income first approach is an appropriate way to implement the spousal impoverishment provisions. In addition, the Centers for Medicare and Medicaid Services ("CMS"), formerly known as the Health Care Financing Administration ("HCFA"), the federal agency charged with interpreting the Medicaid statute, permits states to implement the spousal impoverishment provisions through an income first approach. Even if the Court found that the features of the statute and legislative history did not establish conclusively that Congress did not impose a resource first approach, in light of longstanding administrative law principles requiring deference to permissible agency interpretations, Wisconsin's income first approach should be upheld. Wisconsin's adoption of an income first approach is consistent with a

permissible interpretation of the statute by the federal agency charged with implementing the Medicaid statute.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court set forth the following test for construing statutes in light of agency interpretations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.

467 U.S. at 842-43 (emphasis added). A permissible construction need not be the only possible construction of the statute, or even the construction that a court would adopt if examining the issue as a matter of first impression in the absence of an administrative interpretation. *Id.* n.11. Recently, in *United States v. Mead Corp.*, __ U.S. __, 121 S. Ct. 2164, 2177 (2001), this Court reaffirmed that even where *Chevron* deference does not apply, a reasonable statutory interpretation by the agency charged with administering the statute is entitled to some deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Formal regulations implementing the spousal impoverishment provisions have not yet been adopted. However, HCFA issued interpretive manuals that provide guidance with

respect to the operation of the Medicaid program. In 1989, HCFA issued an interpretation of the spousal impoverishment provisions as part of its State Medicaid Manual ("SMM"), HCFA Pub. 45, which indicated that states were required to adopt an income first approach. The Manual provides:

> When either member of couples establish that income generated from resources deducted as community spouses' spousal allowances are inadequate to raise community spouses' income to the minimum amount to be deducted as a maintenance allowance in the post-eligibility determination, substitute the resource amount calculated in subsection B, step 2. for amounts State hearings officers determine to be adequate to provide the minimum monthly income allowance. *There are no substitutions when institutionalized spouses do not make available monthly income to community spouses.*

SMM § 3262.3 (emphasis added). *See also* SMM § 3703.4 ("For an individual with only a spouse at home, deduct from the individual's total income an amount for the maintenance needs of the spouse."). HCFA's Chicago Regional Office provided similar guidance in 1993, stating: "we are requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance . . . before being allowed to raise the [CSRA] . . . ." Chicago Regional State Letter 51-93 (Dec. 1993). These interpretations make clear that HCFA has viewed the income first approach as a proper way to implement the spousal impoverishment provisions.

Although its manual provisions have not been rescinded, they also are not legislated rules. Consequently, HCFA retained discretion, which it has recently exercised, to take a more liberal view of what states may do with respect to the spousal impoverishment provisions. HCFA presently advises that the statute permits *either* an income first or a resource first approach that depends, essentially, on whether the state chooses to make the income of the institutional spouse

available first. *See* HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994); Chicago Regional State Letter 22-94 (July 1994); Letter from Donna E. Shalala to George V. Voinovich (March 1996). In either case, Wisconsin's income first approach has never been incon-sistent with HCFA guidance.

HCFA's interpretation of the spousal impoverishment provisions to allow states to implement an income first approach is a permissible interpretation of the statute in light of the fact that no explicit statutory provision or legislative history mandates a resource first approach. Thus, in the absence of compelling legislative materials supporting respondent's construction (and in light of the reasonableness of the state's approach), the state's income first approach should be sustained as a permissible interpretation of the statute under *Chevron*.

E. Congress Did Not Intend to Restructure Long Term Care Financing by Mandating a Resource First Approach

Long term care financing differs significantly from other health care financing by virtue of the fact that the private commercial insurance market for long term care has remained relatively undeveloped. In a 1995 report, the General Accounting Office ("GAO") estimated that 1993 nationwide spending on long term care was approximately $107.8 billion. Although various government programs were the primary sources of this funding, nearly $38.5 billion represented out-of-pocket payments by individuals and families. Private long term care insurance comprised only about $200 million of long term care spending. In other words, private pay revenues constituted over one-third of long term care spending and long term care insurance amounted to less than 0.2 percent of such spending. *See* General Accounting Office, *Long Term Care—Current Issues and Future Directions*, GAO/HEHS Report No. 95-109 (1995).

Various factors account for the limited market penetration of long term care insurance. The insurance industry approaches the long term care market with caution out of actuarial concerns that only those persons most likely to need long term care will purchase insurance and in light of its limited claims experience. *See id.* Additionally, the lack of uniform industry standards for such policies has raised consumer protection concerns. *See* General Accounting Office, *Long Term Care Insurance: Better Controls Needed to Protect Consumers*, GAO/HRD Report No. 92-66 (1992).

In the absence of a viable private insurance market, long term care facilities generally have been required to recoup the costs they incur caring for residents from other payment sources, including Medicare, Medicaid and private-pay arrangements with individual residents (or resident-responsible parties). But both public programs that cover care in a nursing home, Medicare and Medicaid, are subject to significant restrictions: Medicare is designed to be only a temporary source of long term care revenue,[10] while Medicaid imposes significant funding limitations.

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[10] Medicare, established by Title XVIII of the Social Security Act, is a federally funded health insurance program primarily for the aged, disabled, and certain persons with end stage renal disease. *See* 42 U.S.C. § 1395 *et seq*. The Medicare program covers "post hospital extended care services" furnished in a skilled nursing facility. 42 U.S.C. § 1395d(a)(2). But the skilled nursing facility benefit is not a principal form of long term care coverage due to several major limitations in the statute. First, Medicare defines "extended care services" as requiring skilled nursing or rehabilitation services on a daily basis that as a practical matter can only be provided on an inpatient basis. 42 U.S.C. § 1395x(h). *See* 42 C.F.R. §§ 409.31-.33. In other words, Medicare does not cover lower levels of "custodial" care in nursing homes. Second, Medicare generally requires an individual to have first had a three-day inpatient hospital stay, and be admitted to the skilled nursing facility within 30 days of discharge from the hospital. 42 U.S.C. § 1395x(i). *See* 42 C.F.R. § 409.30(a). Third, Medicare only covers up to 100 days per calendar year of skilled nursing care during any spell of illness (provided that the individual continues to

The Medicaid program, enacted by Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343 (codified at 42 U.S.C. § 1396 *et seq.*), is a joint federal-state welfare program to provide medical assistance coverage to persons whose income and resources are insufficient to meet the costs of necessary medical services. *See* 42 C.F.R. §§ 435.600 *et seq.*; 436.600 *et seq.*; *Harris v. McRae*, 448 U.S. 297, 301 (1980). States have some flexibility to determine the precise types of benefits that will be covered under their respective Medicaid programs, but all states electing to participate in the Medicaid program must provide coverage for long term custodial care nursing facility services. *See* 42 U.S.C. §§ 1396a(a)(10)(A); 1396d(a)(4). In contrast to Medicare, Medicaid contains a broad long term care benefit covering nursing facility services and is presently the predominant source for long term care funding. Nevertheless, private payor revenue remains crucial to the financial viability of nursing homes because Medicaide does not necessarily cover its costs.

Consistent with the realization that Medicaid is intended as a public welfare program, it imposes not just significant income and resource limitations on individuals seeking coverage, but increasingly restrictive reimbursement limitations on providers of health care services. Prior to 1980, nursing facilities that participated in the Medicaid program received reimbursement on a "reasonable cost related" basis. 42 U.S.C. § 1396a(a)(13)(E) (1978). But starting in 1980, Congress enacted new payment provisions that eliminated cost-based reimbursement standards for nursing facilities under state Medicaid programs.[11] Congress now requires only that

need skilled services during such period). 42 U.S.C. § 1395d(a)(2). These limitations effectively mean that Medicare's skilled nursing facility benefit is principally designed as a short-term, post-hospital rehabilitative benefit, rather than as a long term care benefit.

[11] The first Medicaid payment provisions that revised Medicaid's cost-based reimbursement structure were collectively known as the Boren

Medicaid rates be determined through "a public process," without references to any substantive payment standards. 42 U.S.C. § 1396a(a)(13)(A)(2000).[12]

Even though Medicaid rates may not be adequate to cover the overall costs of each Medicaid resident's care, long term care facilities that elect to participate in state Medicaid programs are obligated by statute or regulation in many states to fill portions of their facilities with Medicaid-eligible residents.[13] At the same time, federal law prohibits the

Amendment. Under the Boren Amendment, Congress allowed states to pay for nursing facility services provided to Medicaid beneficiaries "through the use of rates . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards . . . ." 42 U.S.C. § 1396a(a)(13)(A) (1995). The Boren Amendment was repealed in 1997, but cost based reimbursement never returned. Even while it remained in effect, post Boren decisions upheld Medicaid program rates that were not structured to cover all of the costs of each eligible individual's medical care. *See, e.g., New Jersey Ass'n of Health Care Facilities* v. *Gibbs*, 838 F. Supp. 881, 900, 903 (D.N.J. 1993) (upholding state's rates which left approximately 5-15% of total system costs [$70-140 million] unreimbursed and paid only 10-15% of Medicaid facilities their full allowable costs), *aff'd*, 14 F.3d 48 (3d Cir. 1994).

[12] The absence of payment standards has resulted in significant Medicaid reimbursement shortfalls. On August 30, 2001, BDO Seidman, LLP reported on shortfalls in Medicaid funding for long term care. Its report, commissioned by AHCA, studied 1999 Medicaid payment rates in thirty-six states and compared payment rates to nursing facilities' cost report data. BDO Seidman estimated that the annual Medicaid shortfall in these thirty-six states exceeded $2.5 billion, $3.3 billion when extrapolated over all fifty states. American Health Care Association, *A Briefing Chartbook on Shortfalls in Medicaid Funding for Nursing Home Care*, (August 30, 2001 BDO Seidman, LLP) Appendix 1 at 7.

[13] In New Jersey, for example, nursing homes must admit Medicaid patients up to certain thresholds. *See* N.J. Regs.10:5-12.2. Tennessee

discharge of a patient because of his or her status as a Medicaid patient. 42 U.S.C. § 1396r(c)(2)(A). In short, a nursing home's ability to manage its patient type and census in order to control spending remains limited too.

In light of the program constraints and statutory restrictions, government programs have permitted nursing homes to increase the rates they charge to private pay residents to cover the losses nursing homes may incur in caring for payment-limited residents. See *Cleary*, 959 F. Supp. 222 at 226. And, not surprisingly, charges generally are higher for private payors. For example, Wisconsin pays, on average, $3,336.90 per month to nursing homes that care for its Medicaid residents. *See* HCIA/Arthur Andersen, *The Guide to the Nursing Home Industry* (2001) at 143 (Appendix F) (Wisconsin average daily rate of $111.23). But when Wisconsin implements the asset transfer prohibitions of 42 U.S.C. § 1396p(c)(1)(A), it estimates that charges for private pay nursing facility residents in Wisconsin average $4,075 per month.

Affirming the rule presently mandated in Wisconsin by its Court of Appeals will allow many institutionalized spouses to qualify for Medicaid more readily than the resource and income limits otherwise would permit. Reviewers tasked to determine whether an obligation to reallocate marital resources exists will be required to disregard the existence of income that will be available to a community spouse while an institutional spouse remains on Medicaid. Private-pay residents who could still shoulder the costs of their care will expedite their eligibility for Medicaid by having assets far above the standard CSRA, and not needed to ensure a particular post-eligibility income stream for their spouses, sheltered.

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imposes a first come, first served rule. *See* Tenn. Comp. R. & Regs. ch. 1200-13-1-08(4) (2000).

Respondent has tended to characterize this case as a parochial matter involving $14,500 in additional resources. But the financial realities for the government programs are no different for Wisconsin and the federal government now than they were in any of the prior cases. When Thomas Cleary brought his lawsuit against New Jersey, he sought to exclude an additional $167,040 in assets that he estimated were required to produce an additional $696.26 in monthly income. *Cleary*, 959 F. Supp. at 227-228. In his complaint, Mr. Cleary also estimated that if the resource first rule were mandated as he was requesting, approximately ten thousand residents of New Jersey's nursing homes would become immediately eligible for Medicaid, changing both the balance of payments to long term care providers and the financial burdens on both that state and the federal government. *Id.* at 225. Similarly, Wisconsin estimates here that if it is required to disregard income that could be used to supplement a community spouse's MMMNA merely because pre-eligibility, before the MMMNA issue ripens, such income is deemed available only to the institutional spouse, Wisconsin can expect to pay significantly more in program costs—an additional $2.4 million annually for each 100 newly-eligible Medicaid residents whose health care would otherwise have been privately financed. *See* Petitioner's Petition for Writ of Certiorari at 20.

Individual responsibility for the costs of health care prior to Medicaid eligibility is an important value underlying the Medicaid program and a cornerstone of long term care financing. Respondent's assertion that the spousal impoverishment provisions mandate the use of a "resource first" approach is inconsistent with the language of the Medicaid provisions at issue and reflects a misapprehension of how the provisions work to protect community spouses while preserving poverty-based eligibility. By ignoring income that will in fact be made available post-eligibility to meet the

needs of the community spouse, merely on the basis that an eligibility review necessarily occurs before eligibility attaches and a mistaken assumption that the statute entitles a spouse to a minimum income stream pre-eligibility, the Wisconsin Court of Appeals decision undermines individual financial responsibility for health care. Insofar as respondent and others similarly situated are permitted to upset a financing balance Congress crafted with states by permitting income that states make available to be ignored, in order to hasten eligibility by protecting excess resources, this issue also carries extremely important practical consequences for providers of long term care. Nothing in the spousal impoverishment provisions or their legislative history suggests that Congress intended to destabilize the industry through elimination of a substantial portion of a significant source of long term care revenue. In truth, Wisconsin's method of ensuring community spousal income protection is consistent with a federal statutory scheme that carefully balances the program's limited resources against individuals' obligations and responsibilities.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the decision of the Wisconsin Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ Of Certiorari To The Wisconsin Court Of Appeals, District IV

BRIEF OF SENIORLAW/LEGAL ACTION OF WISCONSIN, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTRODUCTION AND STATEMENT OF INTEREST[1]

Legal Action of Wisconsin, Inc., is a not-for-profit law firm with offices located in Madison, Milwaukee, and Kenosha, Wisconsin. Legal Action represents approximately 12,000 low income persons annually. Legal Action of Wisconsin has over 260,000 persons in its service territory whose incomes are below the federal poverty line. Most of Legal Action's clients are eligible for public assistance benefits.

SeniorLAW, a program of Legal Action, represents senior citizens in public assistance benefit matters such as Medicaid, Medicare, Social Security, SSI, and Food Stamps. As the Older Americans Act Title IIIB-funded legal service provider for Milwaukee, the largest urban area in the state, and also six additional counties in southeastern Wisconsin, SeniorLAW provides free legal services and advice to 1800-2000 senior citizens per year, supervises non-lawyer "benefit specialists" throughout the region that serve additional elderly clients in public benefits matters, and also provides community education to senior citizens and senior-serving professionals.

This case centers around a subsection of the "spousal impoverishment" provisions of the Medicaid Act, 42 U.S.C. § 1396 *et seq.* These spousal impoverishment provisions are at 42 U.S.C. § 1396r-5 (1994 & Supp. 2000). The

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[1] No counsel for either party authored this brief. No person or entity other than SeniorLAW/Legal Action of Wisconsin made any monetary contribution to the preparation or submission of this brief.

legislative intent in passing spousal impoverishment protections was "to assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity." H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65. Congress was particularly concerned about low-income community spouses, such as those affected by the dispute in this case, when enacting this legislation:

> The purpose of the committee bill is to end this pauperization by assuring that the community spouse has a sufficient – but not excessive – amount of income and resources available to her while her spouse is in a nursing home at Medicaid expense. This will be of particular benefit to older women, who, in the current generation at risk of nursing home care, have often worked at home all their lives raising families and have limited income other than their husband's pension checks.

H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65-68.

The people whom Congress sought to protect are the very people who become SeniorLAW clients. Having specifically noted the plight of low-income homemakers (generally wives), Congress could not have been so shortsighted as to provide for them to meet their needs only as long as their frail spouse survived. Yet, the income-first interpretation of 42 U.S.C. § 1396r-5(e)(2)(C) has this effect, in that the "quick fix" of attributing their frail spouse's income and requiring them to deplete necessary resources puts these spouses in long term poverty. As we have seen in our practice, when spouses have less resources to meet their needs, they more quickly become eligible for public assistance themselves, especially when

they become widows or widowers. The income-first method also forces these community spouses to be dependent on their frail institutionalized spouses for support as opposed to living independently in the community as contemplated by Congress. At the same time, income-first prevents institutionalized spouses from having flexibility to use their income to meet their own medical needs.

The consequences of using the income-first method in determining Medicaid eligibility are of great concern to our clients and thus to our organization. Additionally, we hope that the practical perspective our experience in representing frail and low-income elderly clients brings to this case will be of use to this Court. Consent of all parties has been given for the filing of this brief.

SUMMARY OF ARGUMENT

Other briefs on file with the Court in this matter already provide detailed explanations of the facts of this case, the enactment of the spousal impoverishment protections, the concepts known as "income-first" and "resource-first," and the applicable acronyms. This brief will not reiterate that information. Instead, this brief addresses several specific issues related to the income-first/resource-first debate.

First, concerns raised about the cost of using the resource-first method are inflated. The actual "cost" of resource-first is significantly lower than Petitioner's estimate (Pet. and App. for Writ of Cert. at 20; Pet. Brief on

the Merits at 45-47), because persons excluded from Medicaid eligibility under income-first will not remain ineligible for as long as Petitioner claims. Cases where resource adjustments were granted by virtue of resource-first do not evidence significant "asset sheltering" practices and fall far short of the over $300,000 resource levels predicted by Petitioner. Moreover, the rate of "new" cases that have become eligible under resource-first since the Wisconsin Court of Appeals' decision below is quite low, and would result in a cost of only $200,000 per year, which is negligible in the framework of the Medicaid budget as a whole. Additionally, the higher mandated cost share payment to the nursing facility that is created by the resource-first method lowers costs even further. In fact, in many cases the overall cost of resource-first could be lower than income-first.

Second, the notion of the "anticipatory hearing" put forth by Petitioner and *Amici* supporting Petitioner is incorrect, costly and unfair. It is incorrect because the fair hearing statute, § 1396r-5(e)(2)(A), provides for a hearing at the time of the application, not before. It is costly because it would require the state to hold hearings for a large number of individuals who might never even apply for Medicaid, wasting public dollars on a largely academic process. It is unfair to couples because such a hearing would require hearing examiners to rely on figures that, due to inflation adjustments, are most likely lower than those which will ultimately apply to the couple when they complete the application at some later date; thus causing couples to spend more resources than necessary.

Third, the resource adjustment hearing set forth at § 1396r-5(e)(2)(C) does not depend on all of the factors set

out in (e)(2)(A) because each of the hearing provisions addresses separate issues that can arise in a spousal impoverishment case. Thus, the placement of the resource adjustment provision within the fair hearing section does not compel consideration of all other spousal impoverishment factors, including the community spouse income allowance under § 1396r-5(d). Moreover, the placement and language of (e)(2)(C) mandate a resource-first approach. Since Congress specifically defined the concept of the transfer of income from the institutionalized spouse to the community spouse as the "community spouse income allowance", §§ 1396r-5(d)(1),(2), and did not include that defined phrase in (e)(2)(C), it follows that Congress did not intend for this allowance to be considered in determining whether the CSRA could be adjusted.

Fourth, the resource-first method does not make a nullity of the standard income allowance, since frequently even when all resources are kept, the community spouse's income still falls short, and thus an income allowance is permitted.

Fifth, resource-first appropriately balances the needs of the community spouse, the needs of the institutionalized spouse, and the need for couples to pay their "fair share" for nursing home expenses. This is because the upward adjustment of resources under resource-first generates a correspondingly higher cost share for the institutionalized spouse that reduces Medicaid expense. Additionally, the needs of the institutionalized spouse to have flexibility to pay for non-covered medical costs and expenses are better met by preserving that spouse's income for his or her own use as opposed to forcing a

transfer to the community spouse. Where the forced transfer occurs under income-first, less money is available to meet unanticipated needs of the institutionalized spouse, thus forcing that spouse to either go without, take back money transferred to the community spouse, or use the community spouse's resources, impeding her ability to live independently.

ARGUMENT

I. CONCERNS ABOUT THE COST OF THE RESOURCE-FIRST METHOD OF INCREASING THE CSRA, AND ABOUT THE EXTENT TO WHICH RESOURCE-FIRST WILL CAUSE COUPLES TO SHELTER ASSETS AND FAIL TO PAY THEIR "FAIR SHARE," ARE NOT BORNE OUT BY THE PRACTICAL APPLICATION OF THE RESOURCE-FIRST METHOD.

A set of concerns over the cost of resource-first has been raised by Petitioner and *Amici* in support of Petitioner. (Pet. and App. for Writ of Cert. at 20; Pet. Brief on the Merits at 45-47; Br. of *Amici Curiae* State Medicaid Agencies at 27-29; Br. of *Amici Curiae* American Health Care Association at 24-30.) These concerns can be summarized as follows: 1) resource-first will generate a considerable increase in the amount of public funding spent for Medicaid; and 2) resource-first will increase the extent to which couples will engage in asset sheltering practices and avoid paying their fair share of nursing home costs. These arguments are fundamentally flawed in the assumptions upon which they are based. The first flaw is the assumption that persons who are found eligible under resource-first are persons who, if they were to be

excluded from Medicaid eligibility by virtue of income-first, would then *stay off* Medicaid for the entire length of their nursing home stay. The second flaw is that Petitioner neglects to factor in the mandatory higher cost share generated by the resource-first method. Third, based upon the application of the *Blumer* decision in practice in Wisconsin, the Petitioner's estimate of 100 new cases found eligible under resource-first would take ten years to achieve and is thus exaggerated. When these faulty assumptions are examined, the arguments related to the cost of resource-first are unpersuasive.

A. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $10,000,000 for Every 100 Cases, Overestimates the Length of Time That Income-First Keeps People Off of Medicaid.

Petitioner's estimate (Pet. and App. for Writ of Cert. at 20) that resource-first will result in a "new" Medicaid expenditure of $100,000 per beneficiary is wrong because it assumes that persons found to have excess resources under income-first will stay off of Medicaid for at least 50 months. We do not dispute that 50 months is the average nursing home stay. However, it does not necessarily follow that the same figure is the length of time that persons kept off of Medicaid by the application of income-first, would ultimately go without Medicaid eligibility and payment. In reality, persons found ineligible under income-first will deplete their excess resources and will be on Medicaid in well under 50 months. Thus the per-beneficiary "cost" of resource-first is much lower than Petitioner asserts.

Consider the Blumers to illustrate the point being made here. The facts with respect to the Blumers' assets and income are set forth at pp. 13-14 of Petitioner's Brief on the Merits.[2] Assume that the Blumers are denied eligibility exactly as they were at the initial stages of their case. The economic support specialist advises them that Mrs. Blumer is $14,513 over the applicable asset limit. According to Petitioner, this is a Medicaid expense forever saved. According to Petitioner, at an average of 50 months of Medicaid expenditure at $2,000 per month, it is a savings of $100,000 by virtue of income-first. Or conversely, a new cost of $100,000 had resource-first been applied.

The missing link in Petitioner's analysis is that a denial in one month does not forever bar Medicaid eligibility. In reality, a couple whose resources exceed the CSRA will spend them in order for the institutionalized spouse to become eligible. Assume that the Blumers continue to spend their excess resources of $14,513 on nursing home care for Mrs. Blumer. The record indicates they diminished their resources at the rate of about $3,700 per month. In less than 4 months the couple will have

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[2] These facts are accurate, however the assertion at page 14 with respect to the "$25 monthly shortfall" implies that $25 was the shortfall which the Blumers sought to remedy through an increased CSRA, whereas actually the "$25 shortfall" was the amount by which Mr. Blumer's income fell short of the MMMNA *even after* he would have been allowed to keep all of the couple's excess resources under resource-first. The original shortfall was higher, and based upon the figures in the hearing decision (Pet. For Writ of Cert. 23a-33a) would have been about $85 before any community spouse income allocation or adjustment to the standard CSRA.

reached the standard CSRA. Mrs. Blumer will apply and be found eligible for Medicaid as of the beginning of the fourth month. The period of ineligibility under income-first is three months, not fifty. Thus the total "savings" generated by the income-first method is $6,000, not $100,000.

Information from the State of Wisconsin Division of Hearings and Appeals (DHA), the agency responsible for conducting fair hearings in Wisconsin Medicaid cases, is useful in assessing the accuracy of Petitioner's cost estimate. The DHA website posts copies of the fair hearing decisions that have been issued on the resource allocation question. *See http://dha.state.wi.us/static*. Since the Court of Appeals' decision in this case was published in August, 2000, fifteen decisions have been posted on the DHA website applying the resource-first rule. This is a far cry from 100 cases as estimated by Petitioner. In thirteen of those decisions, the community spouse was allowed to keep additional resources to increase the community spouse's income. However, in three of those cases the couples would also have been eligible under income-first, so they are not "new" cases of eligibility due to the resource-first method. In the remaining two cases the asset increase was disallowed because the assets in question did not generate any income.

Of the ten cases[3] where an increase was allowed, the range of *additional* resources allowed was between

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[3] The decisions where a *Blumer* resource increase resulted in new eligibility are: MRA-9/47931, MRA-70/47970, MRA-70/48333, MRA-22/48798, MRA-70/49065, MRA-67/49302, MRA-44/49009, MRA-44/47850, MRA-11/47906, MRA-25/48984.

$12,037 and $109,595. The range of *total* resources that the community spouse was allowed to retain was between $64,137 and $195,715. None of these Wisconsin cases allowed resources in excess of $300,000 as alleged by Petitioner (Pet. for Writ of Cert. at pp. 19-20 n.14; Pet. Brief on the Merits at p. 45.) The cases on either the low or the high end of this range were exceptional, and eight of the ten allowed a total asset allocation of between $107,000 and $137,000. These amounts do not reflect a significant asset sheltering scheme.

Resources in this range are depleted well before 50 months. Although the actual private pay nursing home rates for each case were not in the decisions, using the state's "average private pay rate" for nursing homes of $4,075, set pursuant to 42 U.S.C. § 1396p(c)(1)(A), the couple who originally was $12,037 over assets can deplete those assets on nursing home care in less than three months, becoming eligible as of the beginning of the third month. In the case of this very real couple, the income-first method would save (and thus the resource-first method would cost) $4,000 in Medicaid payments, not $100,000. On the high end, the couple who were originally $109,595 over assets would deplete those resources in 26 months, not 50. Averaging all ten cases, the average excess resource of $57,924 that was allowed by virtue of resource-first, but would have resulted in ineligibility under income-first, would be depleted in 14 months. An institutionalized spouse found ineligible under income-first could deplete resources in this time frame and then receive Medicaid for the remaining 36 months of the average nursing home stay. Since an institutionalized spouse initially found ineligible under income-first will still get 36 months of Medicaid, the "additional cost" of

resource-first is substantially reduced, to $28,000 per case, not $100,000.

The period of Medicaid ineligibility caused by excess resources under income-first may be further shortened because excess resources can be depleted by meeting needs other than nursing home care. As opposed to the mandatory cost sharing of an institutionalized spouse's income (with certain deductions), *see* 42 U.S.C. § 1396o; 42 C.F.R. § 435.832; Wis. Stat. § 49.45(7)(a) (1999-2000) *read in conjunction with* Wis. Stat. § 49.455(4)(a) (1999-2000), there is no mandatory requirement that a couple's excess *assets* be spent on nursing home care. Simply because a couple must spend resources in order to become eligible for Medicaid does not mean those resources will be spent to pay for the nursing home, resulting in cost savings to the Medicaid program.

It is SeniorLAW's practical experience that seniors who are facing an application for nursing home Medicaid do not come to the application debt-free. Many have outstanding medical debts, other debts, loans, mortgages or needs that must be addressed, such as home repair or personal care assistance for a community spouse. Since the creditors do not back away when a spouse is institutionalized, a leaky roof cannot go unmended, and personal care contracts could provide assurance for a community spouse who has his or her own care needs but now must live alone, seniors would be well advised to spend the excess resources on these matters. This is because *immediately upon* falling below the asset level an institutionalized spouse can reapply for Medicaid and be found eligible. Thus, even under income-first the Blumers could have been eligible the very next month provided

they spent the excess $14,513 to pay a $3,000 hospital bill, a $3,000 credit card debt, a new roof at $4,000 and the rest to pay down the mortgage. In fact, many couples would rather become eligible this way than through the complicated fair hearing process that the Blumers availed themselves of. In such a situation, the institutionalized spouse achieves eligibility under income-first only one month later than under resource-first, and as explained below, on a permanent basis the cost share paid by the institutionalized spouse will be less than it would have been under resource-first. To the extent that spending resources to pay other existing debts could be viewed as "asset sheltering," it is income-first that encourages this practice since income-first requires depletion of the assets to become eligible.

B. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $10,000,000 for Every 100 Cases, Is Undercut by the Amount of Time it Will Take for 100 Cases to Become Eligible, and is Negligible in the Framework of the Medicaid Budget.

In Wisconsin, as evidenced by the hearing decisions, ten "new" Medicaid cases have been approved by virtue of resource-first in a little over a year since *Blumer* was published. At this rate, the Petitioner's estimate of 100 new cases would take over ten years to achieve. As explained in the preceding section, the total cost of those 100 cases in today's dollars would be $2,800,000, spread over fourteen years, or $200,000 per year. This amount is negligible in the framework of the $2.9 billion Medicaid

budget for Wisconsin for a year, *see* Resp. Brief in Opposition to Petition, p. 4, App. 3a-6a. It is a pittance in comparison to the more than $100 million dollars *per year* approved for nursing home rate increases in Wisconsin's 2002-2003 budget. *See*, 2001 Wis. Act 16; *Summary of Highlights of 2001-2003 Budget for DHFS, located at http://www.dhfs.state.wi.us/aboutDHFS/OSF/BudgetSummary92101.pdf*. However, this significantly lower $200,000 per year figure is reduced even further when the higher mandatory cost share resulting under resource-first is factored in, as detailed below.

C. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $100,000 for Every 100 Cases, Is Defective Because it Fails to Consider the Higher Nursing Home Cost Share That Will Be Generated.

The next error in Petitioner's calculation on the cost of the resource-first method is that it appears to neglect the higher cost share that will be paid by the institutionalized spouse in the resource-first method. Because assets are being used to generate income for the community spouse, the institutionalized spouse is transferring less, if any, money to the community spouse.

When an institutionalized spouse becomes eligible for Medicaid, all of that spouse's income must be used as a "cost share" payment to defray the cost of care in the nursing home, with very limited exceptions. These are: 1) a personal needs allowance; 2) a community spouse income allowance, if given; 3) an allowance for dependent family members; and 4) the institutionalized

spouse's non-covered medical and remedial expenses. 42 U.S.C. § 1396r-5(d)(1).

The "Community Spouse Income Allowance" is a figure that represents the difference between the community spouse's income and the MMMNA, § 1396r-5(d)(2), but only to the extent that the institutionalized spouse actually makes that income available to the community spouse, § 1396r-5(d)(1)(B). Thus, the actual allowance under (d)(1)(B) could be less than the amount established under (d)(2) if the institutionalized spouse does not have sufficient income to provide the maximum possible allowance.

The amount that the nursing home spouse can allocate as the community spouse income allowance is directly dependent on the community spouse's income. Generally, in cases affected by resource-first, where the community spouse's income becomes higher as resources are increased, the community spouse income allowance from the institutionalized spouse is lower. Accordingly, *more* of the institutionalized spouse's income will go to the nursing home, and Medicaid costs will be reduced. (There are a number of cases where the community spouse's income, and also the resources available to use for an increased CSRA, are so low that even with an increased CSRA the institutionalized spouse would be able to allocate all of his or her income to the community spouse; however, these are cases where either income-first or resource-first would result in eligibility, and thus not material here.)

Again using the fair hearing decisions from real cases in Wisconsin, in the 10 favorable hearing decisions following the *Blumer* case, the average amount of additional income that was generated from the increase in the CSRA was $241.48 per month. This calculation is based upon the income generated by the assets as a whole in each case, and the proportion of that income which represents the asset increase over the couple's "standard" resource allowance. Because the community spouse's income is $241.48 higher per month due to the added resources, the community spouse income allowance from the institutionalized spouse is $241.48 lower per month. Consequently, the institutionalized spouse's cost share is $241.48 higher and the Medicaid cost is $241.48 lower. Over the average 36 months of Medicaid eligibility detailed in section IA of this brief, this higher cost share will reduce Medicaid payment by $8,693.28. Subtracting this from the $28,000 per-case cost set out in section IA herein, the further reduced per-case cost is $19,307, or a total cost per 100 cases of $1,930,700. This is over 80% lower than the cost estimated by Petitioner. Unlike the temporary deferral of Medicaid expense accomplished where an applicant who is found ineligible under income-first spends down the couple's resources and becomes eligible, the higher cost share generated by resource-first will exist as long as the institutionalized spouse remains in the nursing facility.

D. Income-First May Actually Cost More Money Than Resource-First.

In cases where couples do not use their excess resources to pay for nursing home care and instead pay the mortgage, medical bills, or other expenses, income-first can actually *cost more* Medicaid dollars than resource-first. One Wisconsin hearing case with a *Blumer* resource adjustment allowed an additional $63,516 in resources to make up for a $397 monthly shortfall in the community spouse's income. If income-first applied, they may have spent the excess $63,516 on a $40,000 mortgage payment, $3,500 hospital bill, and $20,016 on five months of nursing home care. The remaining 45 months in the average nursing home stay are covered by Medicaid at a cost of $2,000 per month, or $90,000. Under resource-first, Medicaid would have covered the entire 50 months, but the payment would have been reduced by the $397 per month higher cost share from the institutionalized spouse, so the total Medicaid expense would be $80,150, almost $10,000 less than under the income-first rule.

As a general rule, income-first saves money only where persons are kept off Medicaid for many months or stay a short time in the institution. Since the current rules allow persons to spend resources on other needs to become eligible quickly, and nursing home stays are long, it is likely that income-first could cost more money than resource-first in a large number of cases.

II. THE CONCEPT OF AN ANTICIPATORY HEARING TO SET A CSRA, AND THUS THE IMPLICATION THAT THE CSRA IS A "PRE-ELIGIBILITY" DETERMINATION, IS NOT SUPPORTED BY THE LANGUAGE OF THE STATUTE, IS WASTEFUL, AND IS PATENTLY UNFAIR TO COUPLES.

The Petitioner (Pet. Brief on the Merits at 28-30) and the *Amici* State Medicaid Agencies (Brief of *Amici Curiae* State Medicaid Agencies at 23-24) rely on the concept of an "anticipatory" or "forward looking" hearing, held at some point prior to the time that an institutionalized spouse applies for Medicaid, wherein all aspects of a couple's financial situation can be examined. Under this theory, the institutionalized spouse's income that could "potentially" be allocated to the community spouse under § 1396r-5(d)(1)(B) can be considered in determining whether or not to increase the CSRA.

It should be noted at the outset that *none* of the hearings that applied *Blumer* in Wisconsin were "anticipatory hearings" held in advance of the application process. All hearings were held upon denial of a Medicaid application. This *Amicus* knows of no case in this state where a fair hearing has been held to establish a community spouse resource level, MMMNA and community spouse income allowance, outside of the framework of an actual Medicaid Assistance application and denial.

A. The Language of § 1396r-5(e)(2) Requires an Application for Medicaid in Order for a Fair Hearing to Be Held Under That Statute.

Under the "notice and fair hearing" section of the spousal impoverishment law, § 1396r-5(e), while any couple may request a "notice" (commonly called a "snapshot") related to the amount of the community spouse monthly income allowance, family allowances, and the amount of community spouse resources, *see* § 1396r-5(e)(1), a *hearing* can only be requested "if an application for benefits . . . has been made." § 1396r-5(e)(2)(A). Not only is the requirement of an application set forth explicitly in the text of that provision, the statute also indicates that the hearing provided is one "described in section 1396a(a)(3)" which is the Medicaid statute that provides a fair hearing to "any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." It does not provide a fair hearing to persons wishing financial planning advice from a state hearing examiner. Petitioner's claim that an anticipatory hearing can take place is not supported by the statute.

A technical amendment to the statute confirms that Congress did not intend for an anticipatory hearing to take place. Originally, § 1396r-5(c)(1)(B), the provision for a "snapshot" asset assessment by the State Medicaid Agency, included a requirement that at the time of the snapshot, the State provide a notice indicating that the spouse "has right [sic] to a fair hearing under subsection (e)(2)(E). . . . " However, in the amendment the words "has right [sic]" were replaced with "will have a right" and corrected the statutory reference. *See* Family Support

Act of 1988, Pub. L. No. 100-485, § 608(d)(16)(A)(i). This correction, which changed the tense as well as adding the missing "a", indicates that Congress did not intend spouses to have a right to a hearing at the time of the snapshot, but rather that they are entitled to a hearing at the time of the application.

B. Because an "Anticipatory Hearing" Would Use Figures That May be Outdated by the Time of the Actual Application, it Would be Unfair to Applicants and Their Spouses.

The "anticipatory hearing" fails in practice, since it would require a hearing examiner to apply a *present* presumptive MMMNA and *present* presumptive spousal resource share to an application to be made sometime, perhaps over a year, in the future. Both the CSRA and the MMMNA are figures that are adjusted (historically upward) for inflation on an annual basis. §§ 1396r-5(d)(3),(f),(g). However, a hearing examiner would have no idea what those future adjustments would be and could not take them into account so as to provide accurate calculations ("If you apply in 2001, your MMMNA/CSRA will be $ A/B, if you apply in 2002, your MMMNA/CSRA will be $ C/D" and so forth.) To set a CSRA or MMMNA at an "anticipatory" fair hearing which presumably results in a binding decision, for an application that may not take place for over a year or even longer, would *always* result in the couple spending more resources than necessary. The only way that this hearing process becomes fair and accurate is in the context of a present application for benefits, taking into

consideration the MMMNA and CSRA formulae in effect as of the application date.

C. The Anticipatory Hearing Would Needlessly Use Significant Administrative Resources and Money.

The "anticipatory hearing" would be a monumental waste of administrative time and expense. In every case where a couple requested a notice of their asset and income allocation, they could request and receive a fair hearing *even if they had not applied for benefits*! Every couple where a spouse entered a nursing home could avail themselves of this process. With state records indicating 51,186 people admitted to nursing facilities in 1999, *see Wisconsin Annual Survey of Nursing Homes 1999*, (Nov. 2000) *available at http://www.dhfs.state.wi.us/provider/pdf/99nhhc.pdf*, many of whom would be married, this process could be costly indeed. It is unlikely that the cost of this exercise would be seen as well-incurred, since hearings could be required for couples who would never ultimately apply for benefits. The far more reasonable timing for the hearing is, as set forth in the statute, when the couple applies for benefits for the institutionalized spouse. In this context of determining eligibility, which focuses solely on whether the resource level is met, the post-eligibility community spouse income allocation is irrelevant.

III. THE PLACEMENT OF § 1396r-5(e)(2)(C) WITHIN THE FAIR HEARING STATUTE DOES NOT SERVE TO INCORPORATE THE (e)(2)(A) FACTORS INTO THE DEFINITION OF "COMMUNITY SPOUSE'S INCOME" AND IN FACT SUPPORTS A RESOURCE-FIRST MANDATE.

A. The Three Sections of § 1396(e) Function Separately.

Citing *Cleary v. Waldman*, 167 F.3d 801, 809 (3d Cir. 1999), *cert. denied*, 528 U.S. 870 (1999), *Amici* the State Medicaid Agencies assert that all five factors in 42 U.S.C. § 1396r-5(e)(2)(A) must be considered before an adjustment under (e)(2)(C) is made. Brief of *Amici Curiae* State Medicaid Agencies at 25-26. This conclusion is not accurate.

The five points upon which a hearing can be had under (e)(2)(A) are elements that can be in dispute in a spousal impoverishment situation. (A) is the "general" provision which allows spouses to contest the determinations of various elements themselves. Put another way, (A) allows spouses to request a hearing where the *calculations* are in dispute. On the other hand, (B) and (C) allow hearings where the calculations are not in dispute but either the *undisputed* resource allowance or *undisputed* MMMNA need to be adjusted to meet the needs of the community spouse. Thus, (A), (B), and (C) serve separate functions and are not interdependent. A spouse could ask for hearings under all three sections, each to address a separate problem. This might occur where, for example, a self-employed spouse disputes some aspect of the calculation of her income, and also claims that she has significant expenses that require the MMMNA to be adjusted

upward, and then establishes that she needs to keep more assets to meet that revised MMMNA.

B. The CSRA Adjustment Procedure at § 1396r-5(e)(2)(C) Does Not of Necessity Incorporate All Elements of (e)(2)(A).

While *sometimes* some or all of the five factors in (e)(2)(A) are interrelated or adjustment of one has an effect on another, it is not necessarily so. Each stands on its own. For example, a community spouse may seek a hearing on the determination of income otherwise available to her, § 1396r-5(e)(2)(A)(ii), where her earned income fluctuates or certain deductions from her income were not properly applied. This has nothing to do with the attribution of resources or the determination of the community spouse resource allowance. Similarly, the attribution of resources under (A)(iv) has nothing to do with the income generated by the spousal share of resources under (A)(iii). The attribution of resources has to do only with "determining the resources of an institutionalized spouse at the time of application" and thus the amount of resources available to the *institutionalized spouse*. § 1396r-5(c)(2). The resources of the *institutionalized* spouse have nothing to do with the income generated by the community spouse resource share.

Using the resource-first method does not obviate any of the matters contained in the "general" fair hearing provision set forth at (e)(2)(A). It does not obviate the need for a fair hearing under (2)(A)(i), the determination of the community spouse income allowance. In Wisconsin, the MMMNA is actually a range based upon the

existence and amount of "excess shelter costs" of the community spouse. Wis. Stat § 49.455(4)(c) (1999-2000); 42 U.S.C. § 1396r-5(d)(3)(A). For example, the current MMMNA range in Wisconsin is $1,935 – $2,175. The lower number is the "floor" which is a guaranteed amount that all community spouses are allowed to keep, provided that they have that much income to begin with. However, this "floor" can be raised by showing excess shelter costs, which under current figures must exceed $580.50 per month. For every dollar of shelter cost in excess of the $580.50, the MMMNA is raised correspondingly up to a "ceiling" amount of $2,175. Thus, if a spouse has $700 per month in shelter costs such as mortgage and taxes, the "excess" amount is $119.50 ($700 - $580.50 = $119.50). This amount is added onto the "floor" MMMNA of $1,935, resulting in a MMMNA of $2,054.50. This calculation affects the community spouse monthly income allowance, and is one that could easily raise dispute, in terms of the determination of excess shelter expenses. This calculation will not be eliminated under the resource-first method.

Other sections of (e)(2)(A) remain intact as well. Resource-first does not obviate the need for a hearing under (2)(A)(ii), the amount of income otherwise available to the community spouse. The community spouse may have disputes about the calculation of her earned or unearned income. Likewise, the determinations of the spousal share of resources, the attribution of resources or the determination of the CSRA could all turn on questions of ownership (in cases of property jointly owned with a non-spouse or property which a spouse claims is not owned by either the institutionalized spouse or the

community spouse), valuation, or availability of the resources in question even under the resource-first method.

As these examples illustrate, the provisions of (e)(2)(A) are not necessarily dependent on each other. Additionally, the use of the disjunctive "or" in (A) indicates that Congress felt them to be separate issues, *see Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979). Thus the placement of (e)(2)(C) with relation to these factors is insignificant and does not require their inclusion in the resource adjustment determination under that subsection.

C. Congress' Choice of Language and the Framework of the Fair Hearing Section Support a Resource-First Mandate.

The framework of the fair hearing section of the spousal impoverishment law suggests that Congress intended resources to be the primary factor in the adjustment under (e)(2)(C). This is because (e)(2) sets out first, a general subsection on matters that can be disputed, second, a way of increasing the *minimum income level* for the community spouse, and third, a way of increasing available *assets* for the community spouse. Under (2)(B) a spouse can claim that a community spouse needs a higher MMMNA income to meet expenses, and under (2)(C) a spouse can claim that the community needs additional resources to meet the MMMNA which in that section serves as a "cap" on the amount of resources that can be retained over the original CSRA.

It is unlikely that the means of increasing assets contemplated by Congress in (e)(2)(C) was through a transfer of income from the institutionalized spouse. This is because Congress had defined the concept of the income transfer from the institutionalized spouse, and did not use that defined phrase here. The income the institutionalized spouse is allowed to transfer to the community spouse was defined by Congress as the "Community Spouse Income Allowance". 42 U.S.C. § 1396r-5(d). Congress both established the procedure for calculating the permissible community spouse income allowance (§ 1396r-5(d)(2)) and for the transfer of an actual community spouse income allowance to the community spouse (§ 1396r-5(d)(1)(B)).

It is this community spouse income allowance upon which the entire income-first concept is based. Yet it is not present in(e)(2)(C). If Congress had intended for hearing officers under (e)(2)(C) to use the post-eligibility community spouse income allowance in the resource adjustment calculation, it would have used the phrase it had already gone to the trouble of defining in the statute. But the community spouse income allowance is not included in the CSRA adjustment subsection, thus evidencing that Congress did not intend it to be a factor in the calculation. " 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United States*, 522 U.S. 23, 20-30 (1997) *quoting Russello v. United States*, 464 U.S. 16, 23 (1983).

The *Amici* State Medicaid Agencies claim that resource-first gives "short shrift" to § 1396r-5(d); however, their own argument that this section is relevant only succeeds if this Court ignores the fact that (d) also specifically defines a phrase signifying the transfer of income from the institutionalized spouse to the community spouse – the "community spouse income allowance" – a phrase that is tellingly absent from (e)(2)(C). On the other hand, the resource first method gives the proper weight to § 1396r-5(d), allowing it to stand on its own as a post-eligibility calculation that allows a variety of deductions from the institutionalized spouse's cost of care liability to the nursing home, one of which is the community spouse income allowance.

IV. RESOURCE-FIRST DOES NOT MAKE A NULLITY OF THE STANDARD INCOME ALLOWANCE

Resource-first does not make a nullity of the standard income allowance, as claimed by *Amici* the State Medicaid Agencies. Brief of *Amici Curiae* State Medicaid Agencies at 25-26. This is best illustrated by use of the Wisconsin fair hearing decisions post-*Blumer*. In 100% of these cases, the increased CSRA was *not* enough to bring the community spouse income up to the MMMNA that had been set for each case. In all cases the standard income allocation was still valid since the institutionalized spouse still allocated a portion of his or her income to the community spouse, albeit much less. The *Blumers* themselves were this type of case, since even if all of their assets were retained to generate income for Mr. Blumer, his income still fell about $25 short and Mrs. Blumer could have

transferred that amount to him as a community spouse income allowance.

V. THE RESOURCE-FIRST METHOD PROVIDES THE GREATEST BALANCE BETWEEN THE NEEDS OF THE COMMUNITY SPOUSE, THE INSTITUTIONALIZED SPOUSE, AND THE STATE'S INTEREST IN COUPLES PAYING THEIR "FAIR SHARE."

The adjustments made under resource-first most appropriately balance the needs of all of the interests involved in the spousal impoverishment considerations: the community spouse, the institutionalized spouse, and the state's interest in defraying Medicaid costs by requiring couples to pay their "fair share" for nursing home care. Where a community spouse's income is low, the CSRA can be adjusted upward requiring less *resources* to be depleted on nursing home care or otherwise, but the institutionalized spouse's cost share goes up, requiring more *income* to be spent on nursing home care. Either way, under resource-first the couple pays its fair share for the institutionalized spouse's care. Conversely, "fair share" payment is only guaranteed under income-first if a couple spends their excess resources on nursing care, which is *not required by current law*. Accordingly, it is the income-first methodology that induces asset sheltering strategies that were discouraged by Congress.

Additionally, the resource-first method also provides the most flexibility for the institutionalized spouse, who somehow seems to have been lost in this debate, to meet his or her own needs. While § 1396r-5(d)(1)(B) provides institutionalized spouses the *option* of transferring funds

to the community spouse, and does not mandate that transfer, the income-first rule has the effect of forcing the institutionalized spouse to transfer the funds or leave the community spouse living with income below the MMMNA. This forced transfer ignores the needs of the institutional spouse. It was indeed recognized by Congress, in (d)(1)(D), that institutionalized spouses may have medical or remedial needs in the nursing facility that are not covered by Medicaid. Some of these expenses that are not covered in Wisconsin could include certain dental, vision, and hearing related services, private duty nursing services, or other personal care items. These medical needs are not necessarily foreseeable at the time of application and may arise at any time after the spouse enters the institution.

At a very minimal $2,000 asset level, the institutionalized spouse does not have a significant pool of resources upon which to draw to meet a non-covered expense. The resources of the community spouse are supposed to be unavailable to the institutionalized spouse after eligibility, *see* § 1396r-5(c)(4). Thus the institutionalized spouse must use his or her income to meet these expenses. Under the resource-first rule, the institutionalized spouse has a greater amount of income at his or her "disposal" to use for these medical or remedial expenses, and when not in use for that purpose it pays for the underlying care in the nursing home. However, where the couple is prohibited by income-first from using assets to raise the community spouse's income to the MMMNA, the institutionalized spouse must transfer his or her income or leave the community spouse with income below the MMMNA. If a non-covered medical or

remedial need arises in the institution, after Medicaid eligibility is attained through depletion of the couple's resources under income-first, the cost of that care must be paid either by the institutionalized spouse *potentially at the expense of the transfer to the community spouse* or by using the community spouse's assets. Thus the effect of the income-first rule impedes the institutionalized spouse's legitimate need to be able to pay for non-covered expenses, or else forces the community spouse to pay for them by "giving back" the income that was transferred to her or the assets that she could retain. This was not the intent of Congress in establishing the spousal impoverishment protections.

CONCLUSION

For the reasons set forth herein, *amicus curiae* SeniorLAW/Legal Action of Wisconsin respectfully requests that this Court affirm the Order of the Wisconsin Court of Appeals in all respects.

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IN THE
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WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ of Certiorari To The
Wisconsin Court of Appeals, District IV

BRIEF *AMICI CURIAE* OF AARP AND NCCNHR IN SUPPORT OF THE RESPONDENT

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No. 00-952

IN THE

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Petitioner,

v.

IRENE BLUMER,
Respondent.

ON WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF *AMICI CURIAE* OF AARP AND NCCNHR

INTERESTS OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of 35 million persons dedicated to addressing the needs and interests of Americans over the age of 50. Although only about five percent of older Americans reside in nursing homes at any given time, over the course of a lifetime, approximately 43 percent of all persons over the age of 65 will spend some time

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[1]Letters of consent from all parties have been filed separately with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

in a nursing facility.[2/] As the largest membership organization serving older Americans, AARP is deeply concerned that the expense of nursing home care can rapidly deplete the lifetime savings of older Americans. AARP has strongly supported the passage of both national and state laws that increase financial protections for spouses of nursing home residents who receive Medicaid. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for individuals of all ages. AARP has filed numerous briefs before this Court in cases involving people with disabilities and federal benefits, including, *Sims v. Apfel,* 530 U.S. 103 (2000); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

The National Citizens' Coalition for Nursing Home Reform (NCCNHR) is a national nonprofit organization whose members are actively involved in issues of nursing home reform and advocacy throughout the United States. Of particular interest to the Coalition are questions concerning full access to high quality of care and quality of life for people needing institutional care. Since Medicaid is the primary source of funding for long term care services, eligibility for Medicaid is a critical issue for the Coalition. The "resources first" rule reduces financial pressures on the community spouse, giving her additional time to visit her institutionalized spouse. Visitation by family improves quality of care and quality of life for residents. The Coalition has filed *amicus* briefs before this Court in cases affecting nursing home care, including *State of Wisconsin v. Bowen,* No. 86-648 (settled); *Yaretsky v. Blum,* 457 U.S. 991 (1982); *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980).

By written consent of the parties, *amici curiae* submit this brief in support of the Respondent.

[2/]Enid Kassner, *Foreword* to William H. Crown, Brian O. Burwell & Lisa Alecxih, AARP, *An Analysis of Asset Testing for Nursing Home Benefits*, at i (1994).

SUMMARY OF THE ARGUMENT

The high costs of nursing home care impoverish many older Americans. A nursing home stay of more than a year can wipe out the lifetime savings of most older families. Living on fixed incomes, older Americans are not likely to be able to replenish the assets that they spend on nursing home care. As a result, older Americans rely on Medicaid for assistance in paying for the enormous costs of nursing home care.

The Medicaid spousal impoverishment provisions of the Medicare Catastrophic Coverage Act sought to protect the community spouse, typically the wife, from impoverishment as a result of the overwhelming cost of nursing home care. Elderly widows have significantly lower income and assets than elderly married couples. The "resources first" rule helps to prevent the pauperization of the community spouse by preserving assets for her support after the death of the institutionalized spouse. Thus, the "resources first" rule is consistent with the purpose of the Act.

ARGUMENT

I. EXTENDED NURSING HOME STAYS IMPOVERISH OLDER AMERICANS, CAUSING THEM TO NEED MEDICAID BENEFITS TO REMAIN IN THE NURSING HOME

Few Americans can afford to spend more than a short period of time in a nursing home. The cost of nursing home care for one year averaged $56,000 in 1998.[3/] Neither Medicare nor private health insurance covers any substantial degree of long-term care services. Medicare covers primarily short-term stays (100 days or less in a benefit period) in skilled nursing facilities following a hospital stay. Private long-term care insurance accounts for under 1 percent of the

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[3/]Enid Kassner & Lee Shirley, AARP, *Medicaid Financial Eligibility for Older People: State Variations in Access to Home and Community-Based Waiver and Nursing Home Services* 1 (2000), *available at* http://research.aarp.org/health/2000_06_medicaid.html.

financing for long term care.[4] Only a small percentage of the wealthiest Americans have purchased private long-term insurance policies that pay for long-term care in nursing homes.[5]

Approximately 70 percent of nursing home residents rely on Medicaid to help pay for their nursing home care.[6] More than one million individuals received Medicaid assistance in paying for nursing home care in 1996. Medicaid is the largest source of financing for nursing home care in this country. Indeed, Medicaid is "our nation's primary response to the long-term care needs of its citizens."[7]

Medicaid has stringent income and asset limits that exclude all but the poorest Americans. However, due to the enormous costs of nursing home care, many older Americans become impoverished when they require extended long term care. Most older persons simply cannot afford the cost of nursing home care for more than a few months.

Approximately 9.7 percent of the nation's poor in 1999 were over age 65. In addition to the older Americans living below the poverty level, many elderly households are just above the brink of poverty. In 1999, 6.1 percent of persons age 65 and older were just above poverty but below 125 percent of poverty. An additional 20.1 percent of people over age 65 were between 125 and 200 percent of the poverty level.[8] The elderly are less likely than other adults to move

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[4]Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans*, in *Persons with Disabilities* 182, 182 (Joshua M. Wiener et al. eds., 1995).

[5]Kassner & Shirley, *supra*, at 1.

[6]Joshua M. Wiener et al., AARP, *Spending Down to Medicaid: New Data on the Role of Medicaid in Paying for Nursing Home Care* 1 (1996).

[7]Kassner & Shirley, *supra*, at 1, 11.

[8]AARP, *Beyond 50: A Report to the Nation on Economic Security* 28 (2001), *available at* http://www.aarp.org/beyond50/.

out of poverty, reflecting the fixed nature of elderly incomes.[9]

Similarly, the elderly are less likely than younger people to be able to replace the assets that they spend.[10] So, if an elderly couple spends almost all their assets on nursing home care for one spouse, there is little likelihood of replenishing those assets to support the other spouse.

Most elderly couples do not possess sufficient assets to pay for even a year of nursing home care for only one spouse. Excluding the value of home equity,[11] the median net worth for married couple households over 65 years of age in 1995 was $47,741.[12] Minority households, specifically black and Hispanic households, have significantly less assets than white households and are even less able to afford the steep cost of nursing home care.[13]

Middle class people who have been financially independent all of their lives often begin their stay in nursing homes paying on their own for their care. In 1993, about

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[9]*Id.* at 30; Frank B. Hobbs & Bonnie L. Damon, U.S. Census Bureau, U.S. Dep't of Commerce, P23-100, *Current Population Reports: 65+ in the United States* 4-16, 4-21, 4-22 (1996).

[10]Hobbs & Damon, *supra*, at 4-23.

[11]The home is an excluded asset in determining Medicaid eligibility. *Spending Down*, *supra*, at 28. *See also* 42 U.S.C. § 1396p(a)(2).

[12]Michael E. Davern & Patricia J. Fisher, U.S. Census Bureau, U.S. Dep't of Commerce, P70-71, *Current Population Reports: Household Net Wealth and Asset Ownership: 1995* xvii tbl. I (2001). Additional data regarding net wealth and asset ownership, as it fluctuated between 1995 and 1998, can be found in the Federal Reserve Board's Survey of Consumer Finances. *See generally* Arthur B. Kennickell et al., Division of Research and Statistics, Federal Reserve Board, *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances* (2000), *available at* http://www.federalreserve.gov/pubs/bulletin/2000/0100lead.pdf.

[13]Davern & Fisher, *supra*, at xv fig. 6; *Beyond 50*, *supra*, at 46.

one-half of nursing home care expenses were paid out of pocket by older Americans.[14/] If older persons are discharged in a few months, they often do not seek Medicaid eligibility. Yet, if their care lasts longer, many residents are forced to spend a lifetime of savings, impoverishing themselves prior to obtaining government assistance to pay for their care.[15/]

The likelihood of needing long term care increases with age.[16/] As chronological age increases, people have a greater probability of having multiple chronic illnesses, and therefore requiring longer stays in nursing homes. While the American population is living longer, many elderly people "live their increased years with multiple illnesses and disabilities."[17/] In 1990, almost a quarter of Americans 85 years of age and older resided in nursing homes, and 90% of all nursing home residents were over 65 years of age.[18/]

Not surprisingly, the overwhelming majority of residents who spend down their assets to qualify for Medicaid are age 65 and older.[19/] Indeed, "[i]mpoverishment resulting from extended nursing home stays has, in effect, become a normal risk of aging."[20/] Medicaid is "a substantial safety net" for disabled and elderly people who are impoverished by the high costs of long term care.[21/]

[14/] *Catastrophic Costs*, *supra*, at 183.

[15/] *Spending Down*, *supra*, at 19.

[16/] *Catastrophic Costs*, *supra*, at 196.

[17/] Hobbs & Damon, *supra*, at 3-14, 3-17.

[18/] *Id.* at 3-14, 6-9.

[19/] *Spending Down*, *supra*, at 19.

[20/] *Catastrophic Costs*, *supra*, at 183.

[21/] *Spending Down*, *supra*, at 29.

II. THE "RESOURCES FIRST" RULE REDUCES THE PAUPERIZATION OF THE COMMUNITY SPOUSE AFTER THE DEATH OF THE INSTITUTIONALIZED SPOUSE

Amici agree with and strongly support the position of Respondent and other *amici* that the "resources first" rule is needed to achieve the goal of the Medicare Catastrophic Coverage Act of 1988. The purpose of the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act was to protect the community spouse, typically the wife, from being forced into poverty as a result of the overwhelming cost of nursing home care. *See* H.R. Rep. No. 100-105(II), at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888; 134 Cong. Rec. H3854 (1988). The goal was to provide ongoing protection, not merely to delay impoverishment until after the death of the institutionalized spouse.

Individuals who die while in nursing home care are significantly more likely to have experienced longer nursing home stays than those who are discharged alive.[22/] So, the economic situation of the wife is usually precarious after the institutionalized spouse dies. The couple probably expended significant assets on nursing home care for the institutionalized spouse, and the couple's income is likely to decrease dramatically after the husband's death. The additional economic assistance provided by a small increase in asset income is essential in many cases to maintaining some measure of independence and dignity. The "resources first" rule carries out Congress' intent to keep the widow out of poverty.

[22/] *Catastrophic Costs*, *supra*, at 196.

Women tend to live longer than men,[23] and are more likely to be the surviving spouse. In 1999, 32 percent of women over age 55 were widowed compared to only 9 percent of men of comparable age. As women age, the likelihood that they will be widowed increases rapidly. Indeed, 77 percent of women 85 years and older are widows.[24]

The poorest segment of the elderly population are unmarried (or widowed) women, and the likelihood of impoverishment increases with age. In 1999, 13.4 percent of unmarried women over 65 years of age lived in poverty, as did 9.7 percent of unmarried men over 65. In contrast, approximately 5 percent of married couple families 65 and over lived in poverty.[25] Women who are widowed are at a much higher risk of living in poverty.

Both older men and women living alone (most of whom are widowed) have significantly fewer assets than older married couples, likely reflecting the spending of those assets on medical care or long term care for the spouse who died.[26] While married couple households over age 65 had a median net worth (excluding home equity) of $47,741 in 1995, single men over age 65 had a median net worth of $15,374 and single women over age 65 had a median net worth of

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[23] Denise Smith & Hava Tillipman, U.S. Census Bureau, U.S. Dep't of Commerce, P20-532, *Current Population Reports: The Older Population in the United States: March 1999* 1 (2000). In 1999, the ratio of men to women age 55 and over was 81 men to 100 women. The male-female ratio drops steadily with age. For Americans age 85 and over, the male-female ratio was 49 men to 100 women. *Id.*

[24] *Id.* at 3.

[25] *Id.* at 4.

[26] *See* Cathleen D. Zick & Karen Holden, *An Assessment of the Wealth Holdings of Recent Widows*, 55 J. GERONTOLOGY: SOCIAL SCIENCES S90, S96 (2000).

$11,100.[27] Thus, after the death of a spouse, the surviving spouse has few assets to finance his or her own medical and long term care.

Moreover, after the death of an institutionalized husband, the wife is likely to obtain reduced pension and Social Security benefits, resulting in diminished income. "[T]he average household income of married women falls sharply in the United States when their husbands die, even when income measures are adjusted for the reduced consumption needs of the now smaller household unit."[28]

An AARP survey found that approximately half of the states do not impose any type of "spousal consent" requirement before a pension plan participant waives survivor benefits.[29] A widow in those states might not receive any survivor benefits after the death of the spouse who received the pension. Indeed, Census Bureau data from 1990 to 1992 show that only 59% of the widows of pensioners received any post-widowhood pension. In addition, even where pension income was reported, the post-widowhood pension income was 71% of the husband's pre-widowhood pension income.[30]

Similarly, the Census Bureau data show that Social Security benefits declined by almost 40% from the pre- to post-widowhood period among women widowed during the early part of the 1990s.[31] For a single-earner couple, during the lifetime of the working spouse, the retired worker receives a Social Security retired-worker benefit, and the nonworking spouse receives a benefit equal to 50 percent of that amount.

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[27] Davern & Fisher, *supra*, at xvii tbl. 1.

[28] Karen C. Holden & Cathleen Zick, *Insuring against the Consequences of Widowhood in a Reformed Social Security System, in Framing the Social Security Debate* 157 (R. Douglas Arnold et al. eds., 1998).

[29] AARP, *Falling Short: A 50-State Survey of Spousal Rights under State Pension Plans* iii (1994).

[30] *Insuring against the Consequences of Widowhood, supra*, at 166.

[31] *Id.* at 165-166.

After the death of the retired-worker spouse, the widow will be paid a benefit equal to the deceased worker's benefit, which amounts to only two-thirds of the combined pre-widowhood benefit. For a two-earner couple in which the spouses have identical covered-earnings history, after the death of a spouse, the surviving spouse receives only her own retired-worker benefit without any additional payments to compensate for the loss of the deceased spouse's benefits. For this two-earner couple, the post-widowhood Social Security income is only half of the pre-widowhood income.[32]

In order for a widow to maintain the same standard of living as when both spouses were alive, she needs to receive eighty percent of the couple's pre-widowhood income.[33] However, most widows do not receive eighty percent of the couple's income, since both their pension and Social Security income drop dramatically after the death of the spouse. As a result, "many married women face a significantly increased risk of poverty following the death of their husbands."[34]

The "income first" rule forces the community spouse to spend down the couple's assets and live on her husband's income during his lifetime. Yet, after his death, his pension or Social Security income, or a significant portion of it, may no longer be available to her. As a result, the "income first" rule greatly increases the risk that the community spouse will be impoverished after the death of the institutionalized spouse. In contrast, the "resources first" rule helps to reduce the pauperization of the community spouse, since it preserves assets for her support after the institutionalized spouse has died. Thus, the "resources first" rule is consistent with the purpose of the Medicare Catastrophic Coverage Act, *i.e.* to protect the community spouse from impoverishment.

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[32] *Id.* at 159.

[33] Karen C. Burke & Grayson M.P. McCouch, *The Impact of Social Security Reform on Women's Economic Security,* 16 N.Y.L. SCH. J. HUM. RTS. 375, 384 (1999).

[34] *Id.*

CONCLUSION

For the reasons stated herein, *amici curiae* urge the Court to affirm the decision below.

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Argument 5

The Court of Appeals correctly concluded that Appellants violated the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396, *et seq*. 5

1. The statute is clear and unambiguous. 5

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The Ohio State Bar Association and the National Academy of Elder Law Attorneys respectfully submit this brief *amici curiae* in support of the Respondent in this case.[1]

The Ohio State Bar Association is a professional association, which represents 25,000 members in the State of Ohio. The board of governors of the Ohio State Bar Association unanimously approved the filing of an Amicus brief in this case on or about September 14, 2001.

The National Academy of Elder Law Attorneys is a professional association of approximately 3,700 attorneys who primarily represent the elderly and the disabled. The board of directors unanimously approved the filing of an Amicus brief in this case on or about July 21, 2001.

The two professional organizations file this *amici curiae* brief based upon their shared concern for well-being of the community spouses, particularly women who usually have a lower fixed income, within the State of Ohio and throughout the country. It is also the position of these two professional organizations that granting *Chevron*-type deference to agency proclamations such as those in this case, undermines the legislative intent and the legislative process.

GLOSSARY

For the Court's assistance, the following glossary of terms and abbreviations will be used throughout this Brief:

HHS — United States Department of Human and Health Services.

HCFA — Health Care Financing Administration of the U.S. Department of Health and Human Services, now

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1. Pursuant to Rule 37.6, the *amici* states that neither counsel for the Respondent or the Petitioner authored this brief in whole, or in part, nor did any person or entity other than the *amici* make any monetary contribution to the preparation or submission of the brief. Respondent and Petitioner have consented to the filing of this brief and such consents are being lodged herewith.

known as The Centers for Medicare and Medicaid Services.

IS — Institutionalized Spouse

• Married, living in a nursing facility, with his spouse residing in the community. 42 U.S.C. § 1396r-5(h)(1). In this Brief, the IS will be referred to using the masculine pronoun and the CS will be referred to using the feminine pronoun.

CS — Community Spouse

• Married, living in the community, with her spouse in a nursing facility. 42 U.S.C. § 1396r-5(h)(2).

MCCA — The Medicare Catastrophic Coverage Act of 1988. 42 U.S.C. § 1396 et seq. provides protection for CS from impoverishment.

CSRA — Community Spouse Resource Allowance

• A resource level designed to protect the CS from impoverishment and calculated at one-half of all countable resources, with a minimum and a maximum level; in 1996 the minimum was $15,348 and the maximum was $76,740. 42 U.S.C. § 1396r-5(f)(2). The 2001 levels are a minimum of $17,400 and a maximum of $87,000. The States are permitted to establish the minimum anywhere between these two figures. Twenty-one (21) States and the District of Columbia currently use the lowest possible CSRA, while twenty-two (22) States currently use the highest CSRA as the minimum.[2]

2. States using the minimum CSRA are: Arizona, Arkansas, Connecticut, District of Columbia, Indiana, Kansas, Maryland, Michigan, (Cont'd)

MMMNA — Minimum Monthly Maintenance Needs Allowance

• An income level designed to protect the CS from impoverishment and set at 150% of the federal poverty level; for 1996, $1,295 per month as the minimum and a maximum of $1919 per month. 42 U.S.C. § 1396r-5(d)(3). The 2001 levels are $1452 and $2175 respectively, per month. The States are permitted to establish the minimum anywhere between these two figures. Thirty-one (31) states currently use the lowest allowable MMMNA, while sixteen (16) states and the District of Columbia currently use the highest MMMNA.

(Cont'd)
Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Virginia and West Virginia. States using the maximum CSRA are: Alabama, Alaska, California, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wyoming.

States using the minimum MMMNA are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington and West Virginia. States using the maximum MMMNA are: Alaska, California, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Mississippi, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. John J. Regan and Michael Gilfix, *Tax Estate and Financial Planning for the Elderly* (1999).

CSMIA Community Spouse Monthly Income Allowance

• An allowance that is calculated after an IS is determined to be eligible for Medicaid to determine if the CS is also entitled to part of the IS's income. 42 U.S.C. § 1396r-5(d)(2).

SUMMARY OF ARGUMENT

Petitioner's appeal is not well taken for several reasons, any one of which is sufficient to affirm the Wisconsin Appellate Court's order. The underlying position of the Ohio State Bar Association (hereafter OSBA) and the National Academy of Elder Law Attorneys (hereafter NAELA) is:

The Court of Appeals correctly concluded that the State of Wisconsin violated the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988. 42 U.S.C. § 1396, et seq.

1. The statute is clear and unambiguous.

The spousal impoverishment provisions of the MCCA are clear and unambiguous and establish a statutory application and appeal process. A CS is entitled to retain resources which will generate income which, when added to her other income, will help her achieve a monthly income which reaches the MMMNA set by federal statute.

2. The HCFA's "income first" rule is directly at odds with the spousal impoverishment protection of the MCCA.

An "income first" rule would require a couple to spend down resources and force a CS to rely on the income of the IS. The MCCA's goal was to give the CS assets "up front" so she does not have to worry about what happens to the IS's income, upon the death of the IS.

3. The State of Wisconsin has other more appropriate remedies.

The Appellant's implementation of the "income first" rule is not the appropriate remedy for the financial hardship mentioned in the Appellant's brief. The state could withdraw from the program, lobby Congress to change the statute, or adjust the minimum levels for the CSRA and MMMNA to lessen the fiscal impact of the MCCA.

4. The legislative history of the MCCA does not support the Petitioner's argument.

There is no need to examine the legislative history in the instant case since the relevant statute is clear and unambiguous. However, an examination of legislative history does not support Appellant's "income first" argument and instead, reveals Congress' intent to first protect the CS from impoverishment through a transfer of resources.

5. The HHS and the HCFA are not entitled to deference relating to — 42 U.S.C. § 1396r-5(e)(2)(C).

The relevant federal statute is clear and unambiguous; therefore, there is no need for an "interpretation." There are no regulations in place. If, however, an interpretation is needed, HCFA waited 13 years, after the Court accepted jurisdiction, to offer a proposed regulation, which supports the state's argument. There is nothing to which to defer.

ARGUMENT

The Court of Appeals correctly concluded that Appellants violated the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396, *et seq*.

1. The statute is clear and unambiguous.

When a person is institutionalized, he may apply for the payment of some or all of his medical expenses out of the joint state and federal Medicaid funds established pursuant to the MCCA.

The statutory section that deals with married couples, one of whom has been institutionalized, is 42 U.S.C. § 1396r-5. That section sets forth the Medicaid application process and the steps that must be followed in determining whether the IS is eligible for Medicaid benefits.

When an application for Medicaid benefits is filed, the county worker determines the "countable" assets and then divides the countable assets equally between the CS and the IS. Ohio and many other states offer the most minimal protections. Many elderly couples in Ohio, would be financially devastated by an "income first" rule. The workings of this process are often best described with examples. These are all Ohio examples, but are consistent with the rules in 20 other states and the District of Columbia.

Example 1
The husband entered into the nursing home in 1996 with his wife residing in an apartment, with countable assets of $32,000, and each receiving $650 per month of Social Security. Under an "income first" approach, the state would deny Medicaid eligibility to the husband and require that he spend down $16,000 prior to being eligible for Medicaid. Under the "income first" rule, the agency would allow the wife to retain her $650 of monthly Social Security income, $578 per month of her husband's Social Security, and $67 of interest income equaling the MMMNA of $1295. If the husband lived two years and then died, under the "income first" rule, the wife would be left with $16,000 and a total of $650 per month of Social Security. Under a "resource first" rule, during the life of the IS, the CS would be permitted to retain all $32,000, her social security, monthly interest income of $133 and $512 of the IS monthly income (known as the CSMIA). If the husband lived two years and then died, under a

"resource first" rule, the community spouse would have $32,000 and $650 per month of Social Security.

See Ohio Adm. Code Sect. 5101:1-39-34, *et seq*.

Example 2
Same facts as Example 1, except, the wife receives income of $650 per month in Social Security benefits and $1350 per month in a company pension. Under either a "resource first" rule or an "income first" rule, the CS is entitled to keep $16,000 and her fixed income, while the IS must spend his $16,000 down to $2000 and must spend his fixed income to pay for his care. Thus the CSMIA would be $0. If the IS lived for two years, then died, the wife would be left with $16,000, her Social Security and her pension and would not, pursuant to the statute, be impoverished.

Example 3
Same facts as Example 1, except, the couple has countable assets of $70,000, and the wife's income is $1100 per month of Social Security. Based upon an interest rate of 5% per annum, she would receive $145 per month in interest income on the CSRA of $35,000. As her fixed income of $1100 per month and her interest income are short of the $1295 per month by $50 per month, she would be entitled to a small CSRA revision to $46,000. The IS spend down would then be reduced to $22,000. Once they had spent down to $46,000, she would be entitled to the $46,000 CSRA, her Social Security income and the interest on the $46,000, while all of the IS income would go to pay for his care. Upon the husband's death, pursuant to the statute, she would not be considered impoverished.

The State of Wisconsin, and their *amici* supporters ignore or mistake the economic position of most elderly women upon

the death of the husband. The surviving spouse is entitled to either her own Social Security income or her spouse's Social Security income level, whichever is higher, but not both. In Example 1, she would have fixed income totaling $650 at her husband's death. While the statute is not perfect, it does generally protect those who are most vulnerable to impoverishment.

Pursuant to 42 U.S.C. § 1396r-5(f)(2), the CSRA is established by the individual states. This statute grants discretion to the states, to establish the CSRA within certain guidelines. The minimum CSRA for 1996 was $15,348, and the maximum was $76,740. Congress specifically gave the states the discretion to adopt a minimum CSRA between the two figures, but did not grant similar discretion to the states for a methodology relating to CSRA revisions pursuant to 42 U.S.C. § 1396r-5(e)(2)(C).

After the initial CSRA calculation, the county agency must next calculate the MMMNA for the CS, pursuant to 42 U.S.C. § 1396r-5(d)(3) Generally speaking, this is the minimum monthly amount needed by the CS to avoid spousal impoverishment. In 1996, the minimum MMMNA was $1,295 per month, while the maximum was $1,919. Congress specifically granted the states the discretion to establish the MMMNA between these two figures, but did not grant similar discretion to the states for a methodology relating to CSRA revisions pursuant to 42 U.S.C. § 1396r-5(e)(2)(C).

When the IS is determined ineligible, the county agency is not empowered to make any determination as to whether the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA. The next step in the process is for either the IS or the CS, after denial, to request a revision of the CSRA at a fair hearing to be conducted by a hearing officer. It is at this stage of the process where the appellate court held that the Petitioner

was violating 42 U.S.C. § 1396r-5(e)(2)(C), which provides as follows:

> (C) Revision of the community spouse resource allowance.
>
> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, *there shall be substituted for the community resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance*. (Emphasis added.)

According to the statute, the hearing officer has the authority and obligation ("there *shall* be substituted") to revise the CSRA if either spouse establishes that the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA[3] If, as a result of this revision of the CSRA, the countable resources attributed to the IS are $2,000 or less, the IS is eligible for Medicaid benefits.

Only if the IS has been determined to be eligible for Medicaid benefits does the next step come into play: a determination is made of the CS's monthly income allowance (CSMIA), provided by 42 U.S.C. § 1396r-5(d)(2), for the purpose of determining whether part of the IS's income should also be transferred to the CS as a CSMIA. This income transfer is permitted only if the CS's monthly income, when combined with the monthly income from the revised CSRA, is still less than the MMMNA. (*See* Example 1 above.)

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3. The MMMNA may also be increased to a maximum of $1,919 in 1996, if the CS'S shelter costs exceed a certain level.

Example Illustrating Parties' Positions

Example 1 republished gives a practical illustration of how the above statutory provisions work:

> The husband (IS) entered into the nursing home in 1996 with his wife (CS) residing in an apartment, with countable assets of $32,000, and each receiving $650 per month in Social Security.

The county agency would initially set the CSRA at $16,000 and attribute the other $16,000 of countable resources to the IS. The county agency would further determine that the MMMNA is $1,295. Based on the initial calculations, the county agency would deny eligibility as the CS' countable resources exceed $2,000. Either the IS or the CS would have a right under 42 U.S.C. § 1396r-5(e)(2)(C) to request a fair hearing to establish the right to revise the CSRA, as the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA[4]. It is at this juncture that the parties disagree as to what happens next.

The Blumer interpretation.

> The IS or CS would request a fair hearing and establish the right to revise the CSRA. The $16,000 CSRA would, with a 5% rate of return, only generate $800 of income a year, or $67 a month. Thus, when the $67 a month is added to the CS's social security of $650, the CS would only have monthly income of $717, which is well below the MMMNA of $1,295. Thus, the CSRA would be revised to $32,000 (which would provide the CS with income of $134 from the revised CSRA). This would leave no resources attributable to the IS and, therefore, he would be eligible for Medicaid benefits.

4. There is also a right to revise the MMMNA under certain circumstances.

After the determination that the IS is eligible for Medicaid benefits, the next step would be the post-eligibility determination of the CSMIA, as the CS's income would still be short of the MMMNA (she would have $134 of monthly interest income from the revised CSRA of $32,000, and $650 of her monthly social security, which would leave her $511 short). Thus, the CSMIA would be set at $511, or, in other words, $511 of the IS's $650 of monthly social security benefits could be transferred to the CS to raise her total income to the MMMNA of $1,295. The IS' remaining income would then be paid toward the nursing home costs. If the IS died two years later the CS would have $32,000, her Social Security of $650 and $134 of interest per month.

The State's "income first" rule.

Petitioner asserts that under the foregoing example, the IS should be declared ineligible for Medicaid benefits, even after a fair hearing. Under Petitioner's "income first" rule,

> The CS would not be entitled to a CSRA revision since the CS can reach the MMMNA of $1,295 through the $67 a month interest earned on the initial CSRA of $16,000, her $650 in social security, and by imputing $578 of the IS's social security to the CS. Consequently, the $16,000 originally attributed to the IS would continue to be attributed to him and he would not be eligible for Medicaid benefits until he spent down the $16,000 to $2,000. If the IS dies before the CS, and after he has spent down, the CS would be left with her $16,000 CSRA which generates $67 a month in interest income, and she would then be entitled to the amount of social security that was being paid to her late husband ($650); however, she would no longer receive her

> $650 of social security. Thus, the CS's monthly income would be $717 ($650 plus $67 per month of interest), which would leave her $578 short each month of the MMMNA, and by the standards established by Congress, impoverished.[5]

The Wisconsin appellate court properly recognized, as did the first Courts to address this controversy in [*See Kimnach v. Ohio Dep't of Human Serv.*, 645 N.E.2d 825 (Ohio Ct. App. 1994, *discretionary appeal not allowed*, 644 N.E.2d 409 (Ohio 1995), and *Gruber v. Ohio Dep't of Human Serv.*, 647 N.E.2d 861 (Ohio Ct. App. 1994), *discretionary appeal not allowed*, 646 N.E.2d 468 (Oh. 1995)] that the court should start with the statute. This Court has made it clear as to the starting point for interpreting a statute:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the

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5. In an attempt to minimize the consequences of an income first rule, the Solicitor General seeks to imply that the surviving spouse will not suffer a loss of social security benefits (the most common form of income the Appellants transfer under their "income first" rule) on the death of her husband. However, shrewd wording cannot hide the fact that although the surviving spouse may receive "a significant portion of the payments that would otherwise have gone to the institutionalized spouse during her life," The CS effectively loses his/her Social Security. 42 U.S.C. § 402(e). Thus, the CS usually will be forced below the MMMNA.

Another unacceptable result under the Appellants' "income first" rule is the situation when an IS may have income during his lifetime that ceases at the time of his death and is not transferred to his surviving spouse. Thus, under the above example, if the IS's $650 a month in income was a single life pension payment, the CS would receive none of it after his death.

> contrary, the language must ordinarily be regarded as conclusive.

Consumer Products Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 772, 100 S. Ct. 2051, 2057 (1980). Furthermore, the judiciary is the final authority on issues of statutory construction and is obligated to reject administrative constructions that contradict Congress' express intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 843, 81 L. Ed. 2d 694, 702-703, 104 S. Ct. 2778, 2781-2782 (1984). "The Constitution holds that in decisions left to the democratic process the trade-off we are entitled to is the one the legislature provides. Courts have no apparent mandate to impose a different trade-off . . ." the Hon. Robert H. Bork, *The Tempting of America*, page 191 (1990).

The state is trying to convince this court to ignore the language of the statute and focus instead on that party's interpretation of the legislative history. The state seldom references 42 U.S.C. § 1396r-5(e)(2)(C) in its brief. The position of the OSBA and NAELA is that the language of the statute is clear and unambiguous, eliminating any need to examine legislative history. What the state is asking this Court to do is not to "interpret" the statute, but to re-write the statute.

The Wisconsin statute does not comply with 42 U.S.C. § 1396r-5(e)(2)(C). Only the HCFA memorandum creates the appearance of complying with federal law. The MCCA clearly provided the state with discretion to establish the CSRA between a floor and a ceiling, in 1996 $15,348 and $76,740, and the MMMNA between $1,295 and $1,919. Wisconsin, like several other states, provides an elevated minimum CSRA (currently $50,000). Ohio and many other states have chosen the lowest possible CSRA at $15,348 (1996 level).[6] The first courts which

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6. Ohio Administrative Code § 5101:1-39-36 provides that Ohio has adopted the minimal asset protection while OAC § 5101:1-39-221 adopts the minimal income protection.

reviewed the relevant statute, had no difficulty understanding or applying them. (*See Gruber* and *Kimnach*) These appellate courts held that the state was in violation of federal law [42 U.S.C. § 1396r-5(e)(2)(C)] by not revising the CSRA as required by statute and expressly rejected the so-called "income first" argument advanced by the Petitioner. *Kimnach* at 829-30.

The *Gruber* court had no difficulty understanding and applying the clear and ambiguous statutes, and specifically rejected HCFA letters purportedly approving an "income first" approach: "MCCA is unambiguous and therefore not open to interpretation by HCFA." 647 N.E.2d at 867. In addressing the state's argument, the *Gruber* court at pg. 868 stated, in part:

> A clear application of MCCA, without attempting to interpret what Congress' unwritten intentions were, produces a different result than appellee and the HCFA desire. There is absolutely no language in the MCCA that mandates that income should first be shifted as a CSMIA before the CSRA should be increased to allow the CS to generate sufficient income from the CSRA to reach the MMMNA level.

One could search endlessly through the federal statute and congressional record and never find any written "income first" rule. A review of decisions are all devoid of any finding of an "income first" rule, only references to the HCFA memorandum. The "income first" rule is a fiction.

The Wisconsin appellate court considered and rejected the analysis and conclusions of what would usually be considered more prestigious courts in *Cleary v. Waldman*, 167 F.3d 801 (3d Cir. 1999); *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793 (6th Cir. 1999) and *Golf v. New York State Dept. of Soc. Services*, 697 N.E. 555 (1998), and instead found the analysis and rationale employed by two Ohio appellate courts to be more persuasive. (*See Kimnach* and *Gruber*). These two decisions, like the Wisconsin appellate court decision avoid legislative judgments and the efforts to locate ambiguity, accepted by the courts in *Cleary*, *Chambers* and *Golf*.

2. The HCFA's "income first" rule is directly at odds with the spousal impoverishment protection of the MCCA.

In order to prevent the CS from being impoverished, the MCCA guarantees her a minimal level of assets "up front" by providing her with a transfer of resources on which she can rely no matter what happens to the IS or his income. That is why § 1396r-5(c)(2) provides that a meaningful portion of the couple's resources is to be allocated to the CS "as of the time of application for benefits." It is also why 42 U.S.C. § 1396r-5(e)(2)(A) guarantees that with respect to a challenge of the preliminary CSRA determination (and only with respect to a revision of the CSRA), a fair hearing "shall be held within 30 days" of the hearing request — to ensure that she has the correct amount of resources at the outset in order to prevent impoverishment.

Congress required couples to contribute a reasonable amount to the cost of the IS's care by clarifying patient liability in the MCCA so that the IS "paid as he went" for his care by contributing a carefully determined portion of his income to his medical cost. 42 U.S.C. § 1396r-5(d). As reflected in Examples 2 and 3 above, this often will be a substantial contribution because, once the CS has been brought up to the MMMNA, the IS's remaining income will be applied to the monthly cost of his medical care.

Further, the legislation limited eligibility for the program. Prior to MCCA, if the CS had substantial wealth that had been titled solely in her name for two years or more, and the IS was below $2,000, the IS could be eligible for Medicaid. The MCCA prevents a wealthy couple from being eligible by considering the resources of both the CS and IS. While there may still be examples where the CSRA seems unreasonably high or low, the Congress took great care in crafting language which protects most citizens who were impoverished pre-MCCA and restricting eligibility in most cases where eligibility should logically be denied.

The result is that the CS is assured a reliable minimum income that is based on the transfer of the couple's resources, yet the state can also look to the IS's income for a monthly contribution to the costs of medical care. The rationale for such an allocation of the couple's assets is that since the responsibility of the Medicaid system to the IS ends on his death, it makes the most sense to place the risk of fluctuations in his income (the most significant of which will usually occur upon his death) on the Medicaid system, rather than to place that risk on the CS as was done in pre-MCCA.

The approach advocated by the state and HCFA reverses this protection, forcing the couple to spend down resources, their most reliable generator of income, and forcing the CS to rely primarily on the income of the IS. In effect, this makes the couple contribute to the cost of the IS's medical care "up front," by paying the full cost of that care each month until their resources are exhausted, instead of contributing a portion of that cost each month via the IS's income. This results in the state paying a larger percentage of the medical costs once eligibility is established (because the "resource deprived" CS has been forced to receive the IS's income to bring her up to the MMMNA), but substantially delays eligibility until the couple has spent down their resources.

As a consequence, although the state's Medicaid obligation ends at the IS's death, the Petitioner would have the CS bear the entire risk of impoverishment since under their approach, she will have less resources left to offset the loss of her husband's income that occurs upon his death.

The most cursory reading of the Congressional Record during the adoption of § 1396r-5, reveals that Congress did not intend to abandon the CS. The MCCA, by specifically authorizing the substitution of resources prior to eligibility and requiring that the IS must contribute to his medical care out of his income, embodies a Congressional intention to protect the CS against impoverishment both during her husband's

institutionalization and after his death. The appellate court was correct in refusing to permit the Petitioner to frustrate that intent.

While the state on page 46 of its brief opines as to the "balance" created by the HCFA position, it appears that the CS was impoverished before the MCCA, and that many will now be impoverished by the "income first" rule. The states and the HCFA want to retain the benefit of limiting eligibility when the CS has substantial wealth, and deny the protections guaranteed by the MCCA to those most likely to be impoverished. This is not a balanced position. The MCCA was intended to end spousal impoverishment. The "income first" rule only delays impoverishment in many cases.

3. The State of Wisconsin has other more appropriate remedies.

If Wisconsin or any other state is unhappy with the spousal impoverishment provisions in general or specifically 42 U.S.C. § 1396r-5(e)(2)(C), they have three available remedies: (1) to withdraw from the Medicaid program; (2) to adjust the minimum levels of the CSRA and MMMNA to lessen the fiscal impact to the state; or (3) to enlist their Senators and Representatives to amend the spousal impoverishment sections, more to their liking.

Although withdrawing from the program may be financially unattractive, it is an option available to the states should they wish to avoid the entanglements with the federal government in this program.

The Congress established a minimum level for the CSRA ($15,348 in 1996). The House Conference Agreement notes in paragraph c on page 265 "The state, by amending its state plan, could raise the $12,000 minimum resource allowance for the community spouse . . ." ($12,000 was the original minimum CSRA and indexed). Twenty-one (21) states and the District of Columbia have retained the minimum CSRA ($15,348 in 1996), while twenty-two (22) have adopted the maximum figure ($76,740 in 1996), and seven (7) adopted a minimum CSRA

between $15,348 and $76,740 (1996 figures). Congress specifically granted the states the authority to adjust the minimum levels, and the states acted accordingly. If Wisconsin is concerned by the fiscal impact, it can revise the CSRA downward.

There has been no Congressional action to revise 42 U.S.C. § 1396r-5(e)(2)(C). Instead, several states have relied upon HCFA and the courts to emasculate the statute. The states have asked the courts to rewrite the 42 U.S.C. § 1396r-5(e)(2), instead of seeking relief from the legislature.

4. The legislative history of the MCCA does not support the Petitioners' argument.

Tellingly, the Petitioner's argument does not focus on the statute, but with some drafting history of the MCCA, only briefly alluding to the express language of 42 U.S.C. § 1396r-5(e)(2)(C). Obviously, this is backwards.

The legislative history cited by both the United States and the State of Wisconsin emphasizes the House Committee on Energy and Commerce Report's statement that the purpose of the MCCA amendments was to insure that the "community spouse has a sufficient — but not excessive — amount of income and resources available to her." H. Rep. No. 100-105, pt. 2, 100th Cong., 1st Sess. 65 (1987). In addition, the United States cites legislative history dating back to 1965 for the proposition that it is "proper to expect spouses to support each other." Brief for Amicus United States at 3, 17. These isolated statements give the misleading impression that Congress' primary goal was to limit the amount of income and resources available to the community spouse. In fact, the weight of the legislative commentary accompanying the 1988 amendments indicates that the overall legislative purpose was to alleviate the impoverishment of the community spouse in two ways: first by providing spouses with a statutory minimum standard of living, and second by providing the means for the spouse to demonstrate actual need for higher income and resources on a case by case basis.

Congress demonstrated this intent in its review of the Medicaid eligibility rules in effect prior to the enactment of MCCA. These rules were widely perceived by legislators as leading to the impoverishment of spouses, particularly of wives whose husbands needed long term care. The law at that time provided that when one spouse, the husband for the purposes of this discussion, entered into a nursing home or other institution, all of the income in his sole name, including his Social Security and pension income, was considered available to pay for the costs of his long term care needs. H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 66 (1987). The set aside for the maintenance of the needs of the community spouse, for her "maintenance needs level," was in most states tied to the extremely restrictive eligibility criteria of the SSI program. *Id.* The result of these rules was that, "both for determining eligibility and in the treatment of income after eligibility has been established, the spouse in the community may be left with income below the poverty level." H. Rep. No. 100-661, 100th Cong., 2d Sess., 258 (1987). Several legislators noted that the law created disproportionate poverty among elderly women, many of whom worked as homemakers during their lives, and therefore had little or no income in their own names. 133 Cong. Rec. S4321 (annual Ed. February 26, 1987) (statement of Sen. Mitchell).[7]

Moreover, community spouses who sought to increase what would otherwise be the maximum income allowance encountered unacceptable difficulties. Elderly couples were often faced with the need to sue their spouses for support, H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 69 (1987), yet it was the policy of HCFA to ignore the resulting court orders

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7. "Those most commonly affected by this Medicaid law are elderly women who have been homemakers most or all of their lives, and have little or no income in their own name"; *see also* 133 Cong. Rec. H9666 (annual Ed. April 23, 1987) (statement of Rep. Snowe) ("Because women live longer than men and tend to marry older men, the person left impoverished in the community is most often a woman").

and to consider all of the income of the institutionalized spouse, except for the "maintenance needs level" of his wife, as available to him. *Id.*

As for resources, prior law provided that all assets held only in the name of the institutionalized spouse, or in his name as joint owner with his spouse, were considered available to him for eligibility purposes. *Id.* at 67. Congress recognized that the law frequently required the couple to "spend down" virtually all of its resources before one spouse would qualify for Medicaid. As Senator Edward Kennedy stated:

> [A]lthough some elderly couples have sufficient savings and assets from which they can draw to pay these nursing home costs, for most the cost of long-term care far exceeds their available financial resources. . . . However, to become eligible for Medicaid, these elderly couples generally have to resort to a phenomenon commonly termed 'spend-down.' They must meet the state's medically needy resource standard by depleting their lifetime of savings and assets. This requires that both the at-home spouse and the institutionalized spouse become impoverished before Medicaid coverage for nursing home care is achieved. 133 Cong. Rec. S6112 (annual Ed. March 18, 1987) (statement of Sen. Kennedy).

Congress recognized that an all too common result of this spend down requirement was that the CS would herself become dependent on public welfare programs. 133 Cong. Rec. H9666 (annual Ed. April 23, 1987) (statement of Rep. Snowe).

The House Committee on Energy and Commerce report regarding the passage of MCCA summarized its concerns regarding spousal impoverishment as follows:

> Committee Bill. The [impoverishment] of individuals whose spouses reside in nursing homes and receive

Medicaid benefits is not justifiable. The current maintenance needs levels for community spouses, which are limited by current Federal regulation, are inadequate. In some cases, they have forced community spouses, in desperation, to sue their husbands for support. The financial duress that these low maintenance needs levels impose on the community spouse may, in certain cases, even force the premature institutionalization of that spouse.

The Committee Bill would end spousal impoverishment. It revises the current Federal requirements relating to attribution of income, attribution of resources, transfer of resources and post-eligibility application of income. These revisions are limited to the context of a couple with one spouse in an institution who applies for or receives Medicaid. *The purpose of these revisions is to assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity.* H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 66 (1987) (emphasis added).

One of the core principles incorporated into the MCCA amendments was the avoidance of rigid limits on the community spouse's income and assets which existed in prior law. As the Committee put it, "the $1500 limit on the minimum monthly maintenance needs allowance is not absolute." *Id.*, at 72. Instead, the Committee repeatedly asserted the principle that the community spouse's income should be "adequate" to meet that spouse's actual needs:

> The bill makes it clear that an institutionalized spouse who believes that the minimum monthly maintenance needs allowance for the community spouse is inadequate, or who believes that the state has not accurately determined the amount of monthly

> income actually available to the community spouse from other sources, is entitled to a fair hearing . . . .

Id.

The bill passed by the Committee contained several methods to provide the community spouse with "adequate" support in excess of what would otherwise be her maximum income and resource levels. One method, the subject of the instant proceeding, was to allow either spouse to request a hearing to increase the community spouse's resources to generate sufficient income to raise the community spouse's income to the MMMNA. H. Rep. No. 100-661, 100th Cong., 2d Sess., 265 (1987). It is important to note, however, that Congress also intended the fair hearing process to be a forum in which a spouse may demonstrate that her individual circumstances merit income and resources in excess of this amount.

The House Committee provided that:

> [T]he institutionalized spouse is entitled to an opportunity to demonstrate, at a fair hearing, that the minimum monthly needs allowance is inadequate to support the community spouse without financial duress. If the spouse makes this showing, by a preponderance of the evidence, the state would be required to establish an adequate monthly maintenance needs allowance in that case.

Id.

The Senate bill contained similar provisions. It held that if "either the minimum monthly maintenance needs allowance or the community spouse resource allowance (in relation to the amount of income generated by such allowance) is not adequate to support the community spouse without financial duress, the amount of either support is to be increased." *Id.* at 264. The bill that emerged from Conference Committee followed the Senate amendment, modified so that:

> [I]f either the community or institutionalized spouses establishes in a fair hearing that, due to exceptional circumstances resulting in significant financial duress, the community spouse needs income above the minimum monthly maintenance needs allowance, the state is required to increase the allowance to provide this amount, notwithstanding the $1500 statutory ceiling.

Id. at 266. Thus, the hearings officer is charged with more than simply ensuring that the community spouse's income rises to the MMMNA level. The officer is also obligated to take a comprehensive look at the unique circumstances facing each spouse and to determine the appropriate levels of either income or resources to be allowed in each individual case.

To the extent that the Petitioner urges this Court to interpret the law consistently with "the spirit" of the MCCA, the Petitioner's "income first" interpretation should be rejected since its primary effect is to increase the incidence of spousal impoverishment by reducing the amount of resources a CS is entitled to retain.

5. The HHS and the HCFA are not entitled to deference relating to 42 U.S.C. § 1396r-5(e)(2)(C).

The state asserts that the Court should defer to the HCFA and "to administrative interpretations of the provision," particularly where "agencies at both the federal and state level have embraced the rule". While the OSBA and NAELA do not wish to unfairly criticize the HHS and the HCFA, the actions of these federal agencies are the root cause of the confusion at the state level and untold hardship for countless beneficiaries. It is the position of OSBA and NAELA that the HHS and the HCFA positions on "income first" do not deserve deference from this or any other court on this issue for four reasons: (1) The Congress did not delegate authority on this issue to the agencies; (2) The agencies have been inconsistent in the positions taken; (3) The agencies' interpretations are inconsistent

with 42 U.S.C. § 1396r-5(d)(1)(B); and (4) the HCFA "income first" rule is a litigation position.

In *United States v. Mead Corp.* 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001) the Court stated,

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Congress specifically authorized and required that the agency annually recalculate the minimum and maximum CSRA and MMMNA figures. Congress left certain discretion to the states to set the minimum and maximum CSRA and MMMNA. Congress went into so much detail in establishing this statute that HCFA did not promulgate proposed regulations until after the Court granted the writ of certiorari.

The state also fails to explain a portion of the March 3, 1994 HCFA letter which undermines any argument of Congressional intent by stating:

> The "income first" rule is not specified by the statute and as such is a "derived" policy. . . . We would now like to clarify that states have the option to use the "income first" rule or to apply some other reasonable interpretation of the law . . .

The HCFA created a policy not "specified by the statute" and gave the states the "option" to use an "income first" rule. What the state, the HHS and the HCFA have failed to explain is who gave the HCFA the authority to create policy or grant the

states this "option". Moreover, until September 7, 2001, the HHS admittedly had not even issued proposed regulations regarding the spousal impoverishment provisions of the MCCA.

The state in its brief on page 41 states that the lower court was "wrong" when it found that HHS had "waffled" about its interpretation, and suggests that a review of the available evidence clearly proves that point and then recites from the three HCFA letters in 1993 and 1994. It is interesting to note that, in its brief the state failed to include a December 8, 1992, letter from the Department of Health and Human Services to attorney John Ford (Schedule 1), which appears to mandate a "resource first" rule, stated as follows:

> We note that Section 1924(e)(2)(C) of the Act requires that if either spouse establishes, at a fair hearing, that the CSRA is inadequate, in terms of the income the resources generate, to raise the community spouse's income to the MMMNA, the state must substitute a resource allowance that is adequate to provide a minimum MMMNA. That is, the state must substitute for the CSRA a resource allowance to raise the community spouse's income up to the MMMNA.

This HCFA letter is inconsistent with the 1993 and 1994 HCFA letters and the letter from former HHS Director Shalala to former Governor Voinovich.

The 1992 letter to attorney John Ford, would lead one to believe that "resource first" was the only possibility. The subsequent 1993 proclamation issued by the HCFA Chicago regional office, lead the states to believe that "income first" was the only policy, while the March 3, 1994, and July 1994 letters appear to grant the states unlimited discretion in granting CSRA revisions. It is clear from this chronology and from the lack of any meaningful effort by HCFA to investigate Congressional intent for thirteen (13) years, that the agency is following an agenda separate and part from the MCCA and beyond its administrative function.

The letters from HHS and HCFA hardly constitute authoritative administrative interpretation made under a specific grant of authority to which this Court must give deference. *See John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993) (declining to give deference to the Department of Labor where agency "apparently had no firm position").

Moreover, even if the proclamations that support the "income first" rule somehow were deemed an authoritative agency interpretation, the rule would not deserve deference because it is arbitrary and expressly contradicted by the MCCA. Petitioner requires that prior to eligibility, the IS must transfer the maximum amount of income to the CS under section 42 U.S.C. § 1396r-5(d)(1)(B) *before* being allowed to employ section § 1396r-5(e)(2)(C) to raise the CSRA. This "interpretation" of the MCCA reverses the order expressly provided for by the statute. The 42 U.S.C. § 1396r-5(d)(1)(B) income transfer can only occur after the IS "is determined or redetermined to be eligible" for Medicaid, while the Section 1396r-5(e)(2)(C) resource substitution occurs prior to eligibility. The Wisconsin appellate court in paragraph 22, the *Gruber* court on page 868 and the *Kimnach* court on page 647 all note this inconsistency in the "income first" argument.

By contrast, the United States Supreme Court in *Chevron* accorded deference to an EPA regulation, formally promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act, which was implemented pursuant to an explicit grant of authority by Congress. This Court denied *Chevron* deference in *Smiley v. Citibank v. Citibank (South Dakota)*, 517 U.S. 735, 135 L. Ed. 25, 116 S. Ct. 1730 (1996), where the Court considered whether two agency letters, similar to those relied on here by Appellants, constituted evidence of a prior administrative policy. A unanimous Court concluded that they did not:

> [w]e doubt whether either of these statements was sufficient in and of itself to establish a binding agency policy — the former because it was too informal, and the latter because it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks. Nor can it even be argued that the two statements *reflect* a prior agency policy since, in addition to contradicting the regulation before us here, they also contradict one another.

Id. at 743 (emphasis in original). This is entirely consistent with the Court's statement earlier in *Smiley* that "*we deny deference* 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' " *Id.* at 741, *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988) (emphasis supplied). *See also Rowan Cos. v. United States*, 432 U.S. 247, 68 L. Ed. 2d 814, 101 S. Ct. 2288 (1981) (Treasury regulation promulgated under general authority to prescribe needful rules and regulations owed "less deference than a regulation issued under a specific grant of authority to define a statutory term or to prescribe a method of executing a provision.")

This Court specifically addressed a similar opinion letter in the recent case, *Christensen v. Harris County*, 529 U.S. 576, 587, 146 L. Ed. 2d 621, 631-632, 120 S. Ct. 1655 (May 1, 2000), and stated,

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretation such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all which lack the force of law — do not warrant *Chevron*, deference.

The Court further states,

> Of course the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation. In this case the Department of Labor's regulation does not address the issue of compelled compensatory time.

Based upon the majority opinion, the Court should not give deference to these HCFA proclamations.

The HCFA was a party defendant in the matter of *Herley v. Houston*, Eastern Dist. of Pennsylvania District Court, Case No. CV93-3666, which was filed in 1993. The case involved the implementation of 42 U.S.C. § 1396r-5(e)(2) by the State of Pennsylvania. The HCFA moved to be dismissed as a party and created the HCFA memos cited by the State of Wisconsin in this case, as support for HCFA's Motion to Dismiss.

In *Kimnach* and *Gruber*, these HCFA letters were cited in 1994 to support the state's fair hearing decisions issued in 1993 by the State of Ohio (which had been appealed).

This coordinated effort on the part of the state and the federal agency was culminated by the March 28, 1996 letter from former HHS Secretary, Donna Shalala to former governor George Voinovich, which is included in the Joint Appendix at page 90a. This letter supports the *amici* position that the HHS and HCFA either acted in concert or in support of the state agencies against the program beneficiaries.

The Petitioner is asking this Court to defer to the HCFA litigation position in this case. However, as the Supreme Court observed in *Smiley* at 740-741, a litigating position is not entitled to such deference.

The MCCA was landmark legislation, which was intended to "end spousal impoverishment" and significantly changed eligibility criteria. Whether the agency intended to take all possible positions, or intended to allow the states to develop their policies, or whether the agency decided to indirectly create

its own independent policy, this Court should not be swayed by proposed regulations issued thirteen (13) years after the enactment of the statute. The confusion exhibited by the HCFA has led to confusion of the states. While the Petitioner claims that over thirty (30) states employ an "income first" rule, it admits in footnote 11 that only five (5) states have "codified" the rule in a statute or administrative rule. If such a rule exists in most of these thirty (30) states, how did it come into being, upon what authority, how can the citizen locate the rule and why did the HCFA approve these state plans with unwritten policies? To summarize, the HCFA has announced a "derived" policy not specified by statute and twenty-five (25) states have implemented this policy without codification. It is the position of the OSBA and NAELA that Congress did not extend any discretion to the states or the HHS or the HCFA relating to CSRA revisions, in 42 U.S.C. § 1396r-5(e)(2)(C) and that the Courts should not give deference to these informal agency opinions.

CONCLUSION

For these reasons, the Court should look to the statute for guidance and ignore the HCFA proclamations. As was evident to the Wisconsin appellate court and in accordance with the opinions expressed by the Court in *Christensen*, based upon the detail of the statute in question, Congress did "not leave this significant issue unaddressed". Rather, the Congress considered the totality of the financial security of the CS in an effort to "end spousal impoverishment".

The Wisconsin Court of Appeals decision represents a traditional approach for the Court, which is centered upon strict statutory construction and judicial restraint. It correctly found that Congress' intent as established in the statute is not ambiguous, although it is by its nature complex. Congress included great detail in this legislation, not only as to its intentions in protecting the CS, but also into what items were reserved for the states. The "income first" rule does not end spousal impoverishment, it only delays impoverishment. If this Court overrules *Blumer* and passively approves the *Chambers* and *Cleary* decisions, it will have effectively repealed 42 U.S.C. § 1396r-5(e)(2)(C) and will permit the states to impoverish many elderly individuals whose spouses are placed in nursing homes, whom Congress intended to protect.

Respectfully submitted,

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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ Of Certiorari To The Wisconsin Court Of Appeals, District IV

BRIEF FOR THE STATE BAR OF WISCONSIN'S ELDER LAW SECTION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Elder Law Section of the State Bar of Wisconsin ("ELS-W") is a voluntary membership organization of more than 800 attorneys who work in private practice, public interest/legal service organizations, and government agencies providing services to the elderly. Elder law is an interdisciplinary practice that draws on many legal and extralegal subject areas to help senior citizens. Betsy Abramson, et al., *Advising Older Clients and Their Families* §§1.10, 1.14-1.16 (1997). ELS-W seeks to improve " . . . laws affecting the elderly by commenting, where appropriate, on proposed state and federal legislation and by participating in litigation involving elder law issues, including the preparation and filing of amicus briefs in appellate cases. . . . " Bylaws Art. I, §2 (March 2001). ELS-W has a compelling interest in assuring that community spouses and nursing home widows fully benefit from the spousal impoverishment protections Congress requires of the states. Only the "resource first" mandate upheld in *Blumer v. Wisconsin Department of*

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[1] Petitioner and Respondent consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of this brief has been authored by counsel for either party. Submission of this *amicus curiae* brief supporting Mrs. Blumer was authorized by unanimous votes of the ELS-W board and, subsequently, the State Bar of Wisconsin's Board of Governors on September 7, 2001. The brief is submitted by only the ELS-W, not the entire State Bar. It has been prepared by Section members *pro bono* as required by State Bar Bylaw Art. VII, §2.(c)3. ELS-W may only pay for the costs of printing and filing the brief. No persons other than the *amicus curiae*, or its members or counsel made any monetary contribution to the preparation and submission of this brief.

Health and Family Services, 237 Wis.2d 810, 615 N.W.2d 647 (Ct. App. 2000) preserves property income for community spouses that "income first" displaces with disappearing income. Our collective experience is helpful to the court because ELS-W has some years of experience under both methods. Wisconsin has been a "resource first" state twice. The "income first" sentence in Wis. Stat. §49.455(8)(d) (1999-2000) invalidated in July 2000 by the Court of Appeals was added to the statute in August 1993.[2] ELS-W submits this brief to ensure the promise of preventing spousal impoverishment becomes a reality for elderly persons whose deceased wives and husbands needed costly long-term care.

SUMMARY OF THE ARGUMENT

The Wisconsin Court of Appeals correctly held the plain language of 42 U.S.C. §1396r-5(e)(2)(C)[3] in the spousal impoverishment section mandates "resource first" within the context of the Social Security Act. The "income first" method combines the incomes of both spouses to meet community spouses' needs, forcing assets to be used up before Medicaid provides financial assistance.

[2] Wis. Stat. §49.455(8)(d) (1999-2000) changed from "resource first" to "income first" effective August 12, 1993. 1993 Wis. Act. 16, §1403m. *Blumer* became binding prospectively when its publication was ordered on July 26, 2000. Unless otherwise indicated, all references to Wisconsin Statutes are to the 1995-96 version.

[3] All references to the United States Code are to the 1994 version, the pertinent sections of which remained substantially unchanged at the time of Mrs. Blumer's 1996 application.

"Resource first" uses property income to close the gap between community spouses' own incomes and the State's Minimum Monthly Maintenance Needs Allowance (MMMNA) set within the parameters of 42 U.S.C. §1396r-5(d)(3).

Petitioner Wisconsin Department of Health and Family Services (WDHFS) and its supporting *amici* concede the plain meaning of a "community spouse's income." They now argue the United States Department of Health and Human Services (HHS) has authority under 42 U.S.C. §1396a(a)(17) to deem a post-eligibility support allowance from an institutionalized spouse's income to a community spouse during the initial eligibility determination. The amount of the transfer under the invalidated Wisconsin statute, Wis. Stat. §49.455(8)(d), cannot be determined, however, without first separately attributing income to each spouse.

This new argument ignores that Congress had already dictated, in other Medicaid statutes, that the baseline categorical programs would control what income is considered for spousal impoverishment eligibility determinations. 42 U.S.C. §1396r-5(a)(3). In this State, like most others, Supplemental Security Income (SSI), Title XVI of the Social Security Act, classified as 42 U.S.C. §§1381, *et seq.* is the applicable baseline program. Those other Medicaid statutes specifically require attributing income to each spouse using SSI's name on the check rule, just as the hearing examiner did here. Pet.-Ap. 25a, Findings of Fact ¶7. Congress went a step further and made sure HHS and the states would not be confused about which rules apply when it superseded 42 U.S.C.

§1396a(a)(17) for spousal impoverishment cases. 42 U.S.C. §1396r-5(a)(1).

Usually, one of two Medicaid statutes governs income eligibility for spousal impoverishment cases, depending on a state's chosen options and the institutionalized spouse's income. The more commonly applicable method compares the institutionalized spouse's income to a special income level, technically set by the rules of a categorically needy option at 42 U.S.C. §1396a(a)(10)(A)(ii)(V). For those whose income is above the special income level, a medically needy test is applied, comparing income, per 42 U.S.C. §1396a(a)(10)(C)(i)(III), with medical expenses.

Both Medicaid statutes require using SSI's name on the check rule, without any deduction for spousal support, to decide an institutionalized spouse's income for Wisconsin's spousal impoverishment eligibility decisions. The special income level rule of 42 U.S.C. §1396a(a)(10)(A)(ii)(V) governs the determination of Mrs. Blumer's income for spousal impoverishment eligibility purposes. It specifies, by reference to 42 U.S.C. §1396b(f)(4)(C), that Mrs. Blumer's income must include all income attributed to her by 42 U.S.C. §1382a, the SSI statute defining income according to the name on the check rule. Thus, the Medicaid statute governing Mrs. Blumer's income for eligibility purposes prohibits reducing her income to fund a post-eligibility transfer to her husband before his resource allowance is increased in a §1396r-5(e)(2)(C) eligibility hearing. Similarly, income during Medicaid's eligibility phase for the medically needy also starts with SSI counted income, without any deduction for post-eligibility spousal maintenance. 42 U.S.C. §1396a(a)(10)(C)(i)(III); *compare* 42 C.F.R. §435.831 (governing income eligibility) and §435.832(b) (post-eligibility spousal maintenance deduction).

No income can be deemed away from Mrs. Blumer or support allowance deducted from her income for Medicaid eligibility purposes because SSI statutes and regulations do not permit an applicant's income to be reduced by spousal support. They also allow no deeming from a potentially eligible applicant to her community spouse. Even where a garnishee deducts court-ordered support payments from applicants' checks, or a pension plan is ordered to pay a community spouse under a qualified domestic relations order, that income continues to be attributed to the institutionalized spouse for eligibility purposes. 20 C.F.R. §416.1123(b)(2). *Estate of G.E. v. Div. of Med. Assist.*, 638 A.2d 833, 835-836 (N.J. Super. App. Div. 1994); *following Himes v. Shalala*, 999 F.2d 684, 688-91 (2d Cir. 1993). Income deductions for Medicaid's eligibility and post-eligibility phases are separately authorized; there is no authority or precedent for authorization in one phase to create a deduction in the absence of separate authority for the other. *LaMore v. Ives*, 977 F.2d 713 (1st Cir. 1992).

When Congress set out to solve the problem of spousal impoverishment, it wanted to make sure all couples paid their fair share. 121 Cong. Rec. H6483 (daily ed. July 22, 1987) (statement of Rep. Tauke). Variations across the states in allowable state policies, Medicaid options, and state administration contributed to unequal sharing of nursing home costs by couples of similar economic means. H.R. Rep. 105(II), 100th Cong., 2d Sess. 4, at 65-69,

73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 888-92, 896.

To assure all couples paid their fair share, regardless of where they lived, Congress created many uniform rules within the spousal impoverishment statute section itself. 42 U.S.C. §1396r-5, created by the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), §303, Pub. L. No. 100-360, 102 Stat. 683. It also created 42 U.S.C. §1396a(r)(2) and amended the medically needy comparability requirement at §1396a(a)(10)(C)(i)(III). MCCA, §303(e), 102 Stat. 754, 763. All of §303 was aimed at the "[p]rotection of income and resources of [a] couple for maintenance of [a] community spouse." MCCA, 102 Stat. 684, 754.

Whenever Congress intends to change the Medicaid laws in a way that alters the settled and basic conditions under which federal funds are granted to the states, it must do so plainly and unambiguously. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981); *Mowbray v. Kozlowski*, 914 F.2d 593, 598-601 (4th Cir. 1990). Accordingly, the *Mowbray* Court held the new comparability requirements did not override other Medicaid statutes linked to the categorical baselines, adopting the interpretation of HHS, also a party to the litigation. *Mowbray*, 914 F.2d at 601.

The Medicaid statute applicable to Mrs. Blumer classifies her as categorically needy and at §1396b(f)(4)(C) unambiguously proscribes any reduction of her income that would otherwise be included under SSI baseline

rules for eligibility purposes. It is well-settled an applicant's income as defined for categorical Medicaid eligibility in an SSI state may not be reduced by a post-eligibility spousal support transfer. Congress has not altered these rules. Even if "the community spouse's income" as used in §1396r-5(e)(2)(C) were ambiguous, which it is not, it would remain unchanged because its definition lies in the statute limiting the extent of federal financial participation in state Medicaid programs and is, itself, linked to the baseline categorically needy rules.

Congress understood that if nursing home widow(er)s could keep more income from assets, they would have less need for welfare and more choices for their own long term care needs. 121 Cong. Rec. H6478 (daily ed. July 22, 1987) (statement of Rep. Panetta); 121 Cong. Rec. S15125 (daily ed. October 27, 1987) (statement of Sen. Reid). Congress intended the spousal impoverishment provisions to eliminate the choice between the poor house and court house married persons faced when confronted by their spouses' needs for nursing home care. 121 Cong. Rec. H6475 (daily ed. July 22, 1987) (statement of Rep. Waxman). Some ruined their own health trying to keep a spouse at home. Many sought support orders, divorces or bankruptcy to avoid impoverishment, leaving the nursing homes to write off uncollectible accounts.

In the long run, preserving a community spouse's property income today will help tomorrow's frail elderly widow(er) pay his or her own way. Congress took the long view when it linked the Minimum Monthly Maintenance Needs Allowance (MMMNA) to the poverty line

for two in 42 U.S.C. §1396r-5(d)(3) and mandated transferring resources first under §1396r-5(e)(2)(C) within the spousal impoverishment provisions.

Wisconsin's experience shows the goal of ending spousal impoverishment, while treating couples fairly, can be realized with negligible impact on the State and Wisconsin's nursing home industry. In the fourteen months (August 2000 through September 2001) since Wisconsin law changed back to "resource first," our analysis of Petitioner's public records identified 10 resulting Medicaid cases. On an annual basis, these cases cost Wisconsin's Medicaid budget (federal and state funds) about $240,000 and Wisconsin's nursing homes about $88,560.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD CONGRESS, BY PLAIN AND UNAMBIGUOUS LANGUAGE, DID NOT MEAN A COUPLE'S COMBINED INCOME WHEN IT USED "COMMUNITY SPOUSE'S INCOME" IN §1396r-5(e)(2)(C); IT MEANT ONLY ONE SPOUSE'S INCOME AND IT TOLD US WHICH SPOUSE IT MEANT.

A. A "Community Spouse's Income" in the Context of the Spousal Impoverishment Provisions and the Social Security Act Includes No One Else's Income.

Whether income belongs to the institutionalized applicant or that applicant's community spouse, referred to as the non-institutionalized spouse before MCCA, has always been unambiguous. *Schweiker v. Gray Panthers*, 453

U.S. 34, 39-40, 50-51, 54-55 (1981); *Herweg v. Ray*, 455 U.S. 265, 267-68 (1982). The duration over which HHS and the states could impute income from the applicant to his or her spouse was the issue. *Id.* By asking this Court to decide whether HHS and the states may employ reverse deeming, Petitioner WDHFS and its supporting *amici* concede the plain meaning of a "community spouse's income." They assume all readers will consistently understand the "institutionalized spouse's income" and the "community spouse's income" or variants thereof when they repeatedly use these terms. For example:

> The question in this case is whether . . . a State may first consider whether the institutionalized spouse could transfer [her] income to the community spouse and thereby bring [the community spouse's] income up to the level set by the statute to meet his monthly needs, making it unnecessary to protect additional resources.

Brief of the United States at 2 (filed September 2001). This necessarily means they must separately attribute the income to each spouse before they can decide how much of the applicant's income may be deemed available for transfer to his or her spouse. Plainly and simply, a community spouse's income is the income possessed by the community spouse using the "name on the check" rule. That rule is also incorporated in §1396r-5(b)(2). Petitioner's Brief at 17, State Agencies' Brief at 11-13, 15. When the "name on the check" rule is applied during the eligibility phase, the statute precludes "income first," leaving "resource first" the Congressional mandate. *Id.* By claiming the Wisconsin Court of Appeals improperly borrowed the "name on the check" rule from

§1396r-5(b)(2), the United States concedes "resource first" is mandated if a "community spouse's income" plainly means the community spouse's name is on the check or title. Brief of the United States at 13, 24.

B. HHS and Wisconsin have no authority to deem income from Mrs. Blumer, the eligible institutionalized spouse, to Mr. Blumer, the ineligible community spouse.

1. Congress rendered 42 U.S.C. §1396a(a)(17) inapplicable to spousal impoverishment cases.

The claim that §1396a(a)(17) gives HHS and the States authority to rewrite the spousal impoverishment law is directly contradicted in that statute section. Congress superseded §1396a(a)(17) by exact citation as *per se* inconsistent with the spousal impoverishment section. §1396r-5(a)(1). Accordingly, when Congress wanted §1396a(k)'s trust income deeming rules to apply under spousal impoverishment, it expressly cross-referenced subsection (a)(17) even though §1396a(k) also cited (a)(17). *See* §1396r-5(b)(2)(B)(i) as enacted by MCCA §303(a), 102 Stat. 755.[4] The spousal impoverishment

[4] §1396r-5(b)(2)(B)(i) said: "In the case of a trust – (i) . . . income shall be attributed in accordance with the provisions of this title [Medicaid] (including 1902(a)(17) and 1902(k) [42 U.S.C. §1396a(a)(17) and (k)], and. . . . " Subsection (k) of 1396a is reproduced at App., *infra*, 1. It said, in relevant part : "(1) In the case of a medicaid qualifying trust . . . , the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17) of this section,. . . . " It was later replaced by §1396p(d) with the cross-reference in §1396r-5(b)(2)(B)(i) conformed. OBRA 1993, Pub. L. 103-66, §13611(d)(1)(C), 107 Stat. 627.

section contained one other instance where a cross-referenced Medicaid statute contained its own reference to §1396a(a)(17). In that case, §1396r-5(d)(1)(D) referred to §1396a(r)(1) which separately defined medical expenses for spousal impoverishment cases by a reciprocal reference back to §1396r-5(d)(1)(D).[5] That reference back to §1396r-5(d)(1)(D) would have been unnecessary if Congress had only partially superseded §1396a(a)(17) on inconsistency grounds.

Petitioner and its *amici* also argue the states have broad discretion to set their own spousal deeming rules inherent in the "reasonable standards" state Medicaid plans must include under §1396a(a)(17). Brief of the United States at 2, Brief of State Agencies at 8, Brief of Petitioner at 37. Medicaid and SSI statutes, other than §1396a(a)(17), specify the income standards that uniformly measure applicants' need for eligibility. *See Schweiker v. Hogan*, 457 U.S. 569, 581-89 (1982) (holding the income limits of §1396b(f) cap the single income standard used to test for medically needy eligibility under §1396a(a)(17)). The standards are not something used by HHS to judge whether a state-devised eligibility test is reasonable. Nor are there several amorphous standards subject to state discretion or HHS interpretation. Only a single medically needy income standard (i.e., cap) may be

[5] §1396r-5(d)(1)(D) referred to section 1902(r)[now §1396a(r)(1)]. MCCA §303(a), 102 Stat. 757. Section 1902(r), itself added at §303(d), states it was defining medical expenses "[f]or purposes of sections 1902(a)(17) and 1924(d)(1)(D) [42 U.S.C. §1396a(a)(17) and §1396r-5(d)(1)(D) . . . with respect to the post-eligibility treatment of income of individuals. . . . " 102 Stat. 762.

set. §1396a(a)(10)(C)(i)(III); *See* also State Medicaid Manual (SMM) §3240.5, HCFA Transmittal 58 (Aug. 1991) (App., *infra*, 5-6). It is well-established income deeming and court-ordered spousal support are not standards. *Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986); *Glosenger v. Perales*, 639 N.E.2d 1127, 1129 (N.Y. 1994).

2. Wisconsin's categorical baseline dictates applying SSI rules to the Blumers.

Medicaid statutes, other than §1396a(a)(17), apply the SSI income rules to Mrs. Blumer's eligibility determination. §1396r-5(a)(3), 42 C.F.R. §435.401. For spousal impoverishment income eligibility, states are to "use plan policies not governed by §1924 [42 U.S.C. §1396r-5] to define ownership in income.", *See* SMM §3261.1, HCFA Pub. 45-3 Transmittal 39 (Oct. 1989). (App., *infra*, 3). The applicable provisions depend on the state's chosen categorical baseline and coverage groups.

Wisconsin has chosen SSI as its categorical baseline for the elderly (those age 65 and over), disabled and blind. Wis. Stat. §49.46. States may choose to follow either the federal SSI rules or their own less generous 1972 welfare rules by exercising the so-called 209(b) option, set forth at 42 U.S.C. §1396a(f). *Mowbray v. Kozlowski*, 914 F.2d 593 (4th Cir. 1990). The eleven 209(b) states, as of April 7, 1995, were Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia. POMS SI 01715.010.A.1., last updated Feb. 16, 2001 (*available at* http:/policy.ssa.gov/poms.nsf).

When Congress used the categorical baseline for spousal impoverishment's income eligibility test, it plainly and unambiguously preserved categorical income exclusions, even those that HHS and states may choose to ignore for post-eligibility cost-sharing purposes under §1396a(a)(17). *LaMore v. Ives*, 977 F.2d 713, 715-16, 719 (1st Cir. 1992). The disabled veterans aid and attendance benefit at issue in *LaMore* illustrates deductions for the eligibility and post-eligibility phases are separately authorized. An SSI regulation, 20 C.F.R. §416.1103, excluded the benefit from income for Medicaid's eligibility test, even though it was income available to pay medical expenses after they were eligible. *Id.* Accordingly, no state may deviate from its 209(b)/SSI baseline rules for determining a community spouse's income during the eligibility phase if doing so results in the applicant spouse's ineligibility. *Id.*, §1396a(r)(2), 42 C.F.R. §§435.401, 435.601.

Medicaid's income eligibility rules for the categorically needy (as expanded by state option) and the medically needy apply to Wisconsin's spousal impoverishment cases. To determine which rules govern Mrs. Blumer's spousal impoverishment income eligibility, her countable SSI income as the institutionalized applicant must be below the income standard for the group. Three income standards are applicable:

a) the federal SSI benefit rate for an applicant without an eligible spouse to decide whether she is categorically needy (SSI eligible) under §1396a(a)(10)(A)(i);

b) the special income level for institutionalized persons or persons receiving waiver services to

divert them from institutionalization, set by the State at no more than 300% of the federal SSI benefit rate[6] per §1396b(f)(4)(C), to determine whether she is categorically needy under §1396a(10)(A)(ii)(V) or (VI); or

c) if her medical expenses exceed her income above the uniform medically needy standard of §1396a(a)(10)(C)(i)(III), as medically needy thereunder. 42 C.F.R. §§435.811, 435.831, SMM §3261.1 (App., *infra*, 3).

The medically needy income test includes a medical expense spend-down, but the special income level does not. Even one dollar of income above the special income level bars eligibility. *Estate of G.E. v. Div. of Med. Assist.*, 638 A.2d 833 (N.J. Super. App. Div. 1994).

The applicant's SSI countable income is determined in the same way for medically needy and SSI categorical eligibility. §1396a(10)(C)(i)(III). Wisconsin expressly links its medically needy income eligibility rules to the federal SSI statutes by defining income as earned and unearned income " . . . that would be included [or excluded] in determining eligibility for the aged, blind or disabled individual under 42 USC 1381 to 1385." Wis. Stat. 49.47 (4)(c) (1999-2000).[7] For the special income level test, the

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[6] Optionally categorically needy eligibility, per 42 U.S.C. §1396b(f)(4)(C) is applicable to an individual whose income " . . . (as determined under section 1382a of this title [SSI], but without regard to section (b) thereof) does not exceed 300 percent of the [SSI] benefit rate. . . . "

[7] The definition of income contained in this statute has been the same for SSI-related applicants since at least 1979. *Swanson v. Health & Social Services Dept.*, 105 Wis.2d 78, 80 n.2,

Medicaid statute itself requires the institutionalized applicant's income to be determined under 42 U.S.C. §1382a [SSI] without subtracting the SSI income exclusions in §1382a(b).[8]

3. The first step in determining Mrs. Blumer's income eligibility was to apply SSI's name on the check rules to separate the Blumers' incomes, which is what the hearing examiner did.

SSI and, therefore, Medicaid treats each spouse's income separately, using the name on the check rule for eligibility determinations. §§1382(a), 1382a; 20 C.F.R. §§416.1102, 416.1123(b)(4), 416.1160(c)(1). The next step would have been to deem Mr. Blumer's income to his wife because he is an ineligible spouse. §1382c(f)(1); 20 C.F.R. §416.1160(c)(2) and (3). But this income deeming rule is inapplicable. §1396r-5(b)(1).

The hearing examiner used the name on the check rule to determine Mrs. Blumer's income before deductions. That income included the Social Security and pension checks she received in her own name, $926.99 and $335.72, respectively, for a total of $1,262.71. Pet.-Ap. 25a, Findings of Fact 7. Mr. Blumer's income of $1,702.45 was determined in the same manner. *Id.*

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312 N.W.2d 833 (Ct. App. 1981), *rev. denied*. This decision also holds only paid medical expenses may be deducted from income during the spend-down period to eliminate excess income barring medicaid eligibility as a matter of federal law, 42 U.S.C. §1396a(a)(17). *Swanson*, 105 Wis.2d at 82-84.

[8] See note 6, supra.

When Mrs. Blumer applied for benefits in 1996, the federal SSI benefit rate for one person was $470. *Advising Older Clients*, §9.62; Wis. Stat. §49.77(2) (1999-00). The special income level was three times that amount or $1,410 because Wisconsin uses the maximum level set by §1396b(f)(4)(C). Wis. Stat. §§49.43(1e), 49.46(1)(e).

Mrs. Blumer's income of $1,262.71 is between the SSI benefit rate of $470 and the $1,410 special income level, so she is income eligible in the categorically needy group, as expanded by state option. Wis. Stat. §§49.46(1)(e), 49.47(4)(c)3. Therefore, the income eligibility rules of §1396b(f)(4)(C)[9] control how her income and that of her husband are defined for the resource allocation increase under §1396r-5(e)(2)(C).

4. Because SSI rules do not recognize spousal support needs or permit reverse deeming to ineligible spouses, Medicaid statutes prohibit the transfers required by "income first."

"Income first" is permissible only if Wisconsin has discretion to transfer some of Mrs. Blumer's income to her ineligible community spouse as a support allowance during the eligibility phase. As we have just seen, the Medicaid statutes dictate, plainly and unambiguously that Mrs. Blumer's income for eligibility purposes must: be determined by SSI's name on the check rule, §1382a; and, may not have any of the SSI income exclusions,

[9] See note 6, supra; *Schweiker v. Hogan*, 457 U.S. 569, 575-76 (1982).

which are listed in §1382a(b) deducted from it. §1396b(f)(4)(C); 42 C.F.R. §435.1005. Even if that were not the case, there is no SSI deduction for support of a spouse in arriving at SSI countable income for income eligibility tests. Therefore, "income first" is not permitted under Medicaid statutes applicable to Mrs. Blumer. Even if Mrs. Blumer were eligible as medically needy, the same rules would apply. *Compare* 42 C.F.R. §435.831 (governing income eligibility) and §435.832(b) (post-eligibility spousal maintenance deduction).

No spousal support, even court-ordered support, may be excluded from SSI countable income for Medicaid eligibility purposes. The income of an institutionalized applicant like Mrs. Blumer includes support or alimony payments received by her, 42 U.S.C. §1382a(a)(2)(E), 20 C.F.R. §416.1121(b)(3), but may not be reduced for support she owes or pays her spouse for his maintenance needs, §416.1124.[10] Even where a payroll or pension check garnishment deducts court-ordered support payments from the applicant's checks before income is received, that garnished income continues to count for eligibility purposes. 20 C.F.R. §416.1123(b)(2). *Estate of G.E.*, 638 A.2d at 835-36 (so holding for a pension check paid to the community spouse under a qualified domestic relations order); *Himes v. Shalala*, 999 F.2d 684, 688-91 (2d Cir. 1993) (so holding for child support); *Tyrrell v. Sullivan*, 972 F.2d 252, 256 (8th Cir. 1992) (holding child support and spousal support must be treated comparably).

[10] There is no explicit income disregard as there is for ineligible spouses whose incomes are being deemed to their eligible spouses under §1382c(f)(1). 20 C.F.R. §416.1161(a)(10).

Similarly, SSI does not authorize reverse deeming from an eligible institutionalized spouse to an ineligible community spouse. For SSI eligibility, reverse deeming only occurs if both spouses are eligible for benefits. §1382(a)(2). For eligible couples, SSI combines the incomes of an eligible individual with an eligible spouse to decide an eligible couple's benefit. §1382(b)(2), 20 C.F.R. §§416.1802, 416.1806. Before MCCA, the Medicaid rules incorporated 209(b)/SSI deeming rules that operated in the same way. *Gray Panthers*, 453 U.S. at 38-40; *Herweg*, 455 U.S. at 267-270.[11] SSI's income deeming rules and those governing spousal support orders control for Medicaid income eligibility testing. *Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986).

Even if Congress had not superseded §1396a(a)(17), reducing the applicant's income by a maintenance allowance for an at-home spouse cannot occur until the post-eligibility rules apply to medically needy cases. 42 C.F.R. §435.832(b)(2). The Medicaid deduction is limited to the lowest level that would disqualify the applicant's spouse from SSI or a 209(b) state's welfare assistance and, thereby, from Medicaid. *Id.* In other words, this post-eligibility transfer of income allows just enough income to be deemed to the at-home spouse to prevent that otherwise *eligible* spouse from remaining income eligible. If this occurred at the eligibility stage, the income would

[11] The earlier cases dealt with how long income deeming could continue, but refused to find the time limits compelled by the 209(b)/SSI deeming rules for eligibility purposes. *Herweg v. Ray*, 455 U.S. at 276. Subsequent legislative action settled the question, leaving only post-eligibility spend-downs for medical care within HHS' purview. *Atkins*, 477 U.S. at 163-166.

be transferred back and forth between the spouses endlessly, making it impossible to determine if either of them is eligible.

5. "Income first" also violates Medicaid's comparability and financial participation requirements.

Reverse income deeming by spousal support transfer is governed by Medicaid's comparability requirement at 42 U.S.C. §1396a(r)(2). *Glosenger v. Perales*, 639 N.E.2d 1127, 1129 (N.Y. 1994), *citing Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986). It gives states some flexibility, but subject to limits. First, states may not exceed the limits on federal financial participation in 42 U.S.C. §1396b(f). *Schweiker v. Hogan*, 457 U.S. 569, 575-76 (1982). Then, within that constraint, states must uniformly apply categorical income methodologies (SSI's income rules in Wisconsin) to spousal impoverishment eligibility determinations. 42 U.S.C. §1396a(r)(2). *See Mowbray v. Kozlowski*, 914 F.2d 593, 601 (4th Cir. 1990); State Medicaid Manual §3240.4 and .5, HCFA Transmittal 58 (Aug. 1991) (App. *infra*, 4-7).

When Congress set out to solve the problem of spousal impoverishment, it wanted to make sure all couples paid their fair share. 121 Cong. Rec. H6483 (daily ed. July 22, 1987) (statement of Rep. Tauke). Variations across the states in allowable state policies, Medicaid options, and state administration contributed to unequal sharing of nursing home costs by couples of similar economic means. H.R. Rep. 105(II), 100th Cong., 2d Sess. 4 at 65-69, 73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 888-92, 896.

To assure all couples paid their fair share, regardless of where they lived, the MCCA specified uniform rules in 42 U.S.C. §1396r-5. It also created §1396a(r)(2) and amended the medically needy comparability requirement at §1396a(a)(10)(C)(i)(III). MCCA 1988, §303(e), 102 Stat. 754, 763. All of these provisions were aimed at the "[p]rotection of income and resources of [a] couple for maintenance of [a] community spouse." MCCA 1988, §303, 102 Stat. 684, 754.

> This bill establishes a uniform national spousal protection policy that applies in all States, whether they are 'SSI,' '209(b),' 'medically needy,' or 'special income level' States, and whether they are community property jurisdictions. [States should be allowed to be more generous but] . . . should not have the discretion to apply methodologies under their *medically needy programs* that are more restrictive – i.e., less generous from the applicant's standpoint – than those under SSI. [emphasis, added.]

H.R. Rep. 105(II), 100th Cong., 2d Sess. 4 at 69, 74-75 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 892, 897-98. Despite agreement by the Senate, the Conference Committee decided to extend " . . . its application to States which offer coverage to optionally categorically needy individuals and to '209(b) states' as well." H.R. Conf. Rep. 100-661, 100th Cong., 2d Sess. at 145, 264, 268 (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1042, 1046. This change appeared to conflict with other Medicaid statutes that dictated the baseline categorical programs controlled Medicaid income and resource methodologies. *Mowbray v. Kozlowski*, 914 F.2d 593, 594 (4th Cir. 1990).

Whenever Congress intends to change the Medicaid laws in a way that alters the settled and basic conditions under which federal funds are granted to the states, it must do so plainly and unambiguously. *Mowbray*, 914 F.2d at 598-601 (4th Cir. 1990); *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). The *Mowbray* Court held MCCA's new comparability requirement, §1396a(r)(2), had not repealed the so-called §209(b) option by mandating SSI as the categorical baseline for Medicaid eligibility in all states. The 209(b) option, at 42 U.S.C. §1396a(f), allows states to link Medicaid categorically needy eligibility to their more restrictive 1972 welfare programs in lieu of SSI. *Mowbray*, 914 F.2d at 595-596.

In its ruling, the Court held §1396a(r)(2) did not override other Medicaid statutes requiring categorical baseline rules to be followed, adopting the interpretation of the HHS, a party to the litigation. *Mowbray*, 914 F.2d at 601. It is well-settled an applicant's income as defined for categorical Medicaid eligibility in an SSI state may not be reduced by a post-eligibility spousal support transfer as discussed previously. In this case, §1396b(f)(4)(C) unambiguously proscribes any reduction of Mrs. Blumer's income that would otherwise be included under SSI baseline rules before her eligibility has been determined, as a specified limit on federal financial participation. Congress has not altered this rule.

Even if "the community spouse's income" as used in §1396r-5(e)(2)(C) were ambiguous, which it is not, it would remain unchanged. Its definition lies in the statute limiting the extent of federal financial participation in state Medicaid programs and is, itself, linked to the baseline categorically needy rules. In other words, as to the

question before this Court, the categorical baseline is inviolate. This is borne out in regulations later promulgated by HHS. 42 C.F.R. §§435.1005, 435.601.

Beyond Congressional desire for uniformity, the reason states cannot alter the baseline categorically needy rules is simple. HHS and the states may be able to control some rules for Medicaid, but they do not control the baseline rules. If the baseline is SSI, the rules are controlled by SSI statutes and the Social Security Administration. If the baseline is 209(b), the rules are controlled by the federal and state laws in effect before 1972. A state is permitted to develop a more generous approach only if it could not cause others to lose their categorical eligibility or exceed the limits on federal financial participation. Otherwise, it may not do so because neither states nor HHS have the power to adjust those rules. Only Congress may do so and it did not here.

II. TRANSFERRING "RESOURCES FIRST" TO RAISE THE COMMUNITY SPOUSE'S INCOME UNDER §1396r-5(e)(2)(C) FAIRLY DELIVERS THE PROMISE OF PREVENTING SPOUSAL IMPOVERISHMENT AT ALMOST NO COST TO WISCONSIN OR ITS NURSING HOME INDUSTRY.

A. Only "Resource First" Meets the Purposes of Ending Spousal Impoverishment and Ensuring All Couples Pay Their Fair Share.

The MCCA was intended to end the impoverishment of community spouses in a way that ensured all would pay their fair share. 121 Cong. Rec. H6483 (daily ed. July

22, 1987) (statement of Rep. Tauke). Then existing rules treated couples of similar means inequitably if one spouse held title to all the resources and income. H.R. Rep. 105(II) at 65-69, 73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 888-92, 896. If they were titled in the community spouse's name, they could be kept; if the spouse in the nursing home held title, everything had to be spent. H.R. Rep. 105(II) at 66-67, 1988 U.S.C.C.A.N. at 889-90. The post-eligibility cost-sharing rules were part of the problem, but so were the rules for "attributing income and resources." *Id.*

1. "Income first" creates inequities allowing some community spouses to keep income others must spend, based on which spouse is institutionalized.

"Resource first" treats community spouses fairly, no matter the source of couples' incomes. "Income first" disfavors property income, the source least likely to decline over the community spouse's life. Retirement income for those age 65 and over is funded 38% from Social Security benefits, 20% from investment assets, 19% from pensions, and 21% from working. SSA, *Income of the Aged Chartbook 1998*, 22 (June 2000).

Pension income often stops or declines when the pensioner dies. As a result, "income first" creates a new inequity like those Congress sought to end with the MCCA. If the pensioner is the community spouse, the pension income may be kept regardless of how large it is, without any obligation to contribute it to the institutionalized spouse's care. §1396r-5(b)(1) and (d). If the

institutionalized spouse dies first, as usually happens, the pension continues to pay for the rest of the community spouse's life. On the other hand, if the institutionalized spouse is the pensioner, the community spouse must exchange property income for a disappearing pension under "income first." After the institutionalized spouse dies, the pension stops or is severely reduced and the property income is gone.

Many pensions pay no death benefits and many pensions do not keep pace with inflation. Payments to survivors are made only during the first 10 to 15 years after the pension begins. The pensioner's spouse often outlives that period. Mr. Blumer has already outlived the 10 year death benefit guarantee on his wife's pension. (R.4: 65-66, 83-84.) Retired Wisconsin and local government employees have overwhelmingly picked one-life annuities, with 15 years guaranteed, 5 years guaranteed, and even no death benefit at all, over those that provide lifetime survivor benefits after they die. Wis. Dept. of Employee Trust Funds, *Comprehensive Annual Financial Report 1999*, at 75. (App., *infra*, 9-10). Until shortly before the MCCA debates, retiring workers could waive survivorship pensions for their spouses. The Retirement Equity Act of 1984 required pension plans to pay a joint survivor's benefit at 50% of the worker's pension, unless the spouse waives it. Pub. L. 98-397, §203(b) created 26 U.S.C. §417 applicable for all plan years after 1986.

2. Congress took the long view when it used the poverty line for two.

Congress understood that today's community spouse could likely be tomorrow's nursing home resident. 121 Cong. Rec. H6478 (daily ed. July 22, 1987) (statement of Rep. Panetta); 121 Cong. Rec. S15125 (daily ed. October 27, 1987) (statement of Sen. Reid). *See* also App., *infra*, 14. Linking the Minimum Monthly Maintenance Needs Allowance (MMMNA) at §1396r-5(d)(3) to 150% of the poverty level for two people was designed to err on the side of keeping the community spouse out of poverty.

After one spouse dies, income, on average, declines to 40% of the level a couple had. That was true when MCCA was being debated and it is true today. The income of unmarried elderly individuals was 39% of that of married couples in 1984, 40% in 1998. *Income of the Aged Chartbook 1998*, 18. An MMMNA set at 150% of the two-person poverty level declines to the one-person poverty level if the income it protects drops by 49% or more at the institutionalized spouse's death.[12]

By setting the lowest permissible MMMNA at 150% of the poverty level for two, Congress protected enough income to keep the average nursing home widow(er) out of poverty, contrary to the assertions in the Brief of the

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[12] In 2001, the federal poverty guideline for one, $8,590, or $716 per month, is 74% of the guideline for two, $11,610, or $967 per month. 66 Fed. Reg. 10695 (2001). A drop from 150% to 100% of the poverty line for two would occur if the income fell by two-thirds. If that level fell to 74%, it would be at 100% of poverty for one. Seventy-four percent of two-thirds is just under 49%.

United States at 16, 28-29. Keeping the community spouse's income above the poverty level for one person was the goal. H.R. Rep. 105(II) at 76-77, 1988 U.S.C.C.A.N. at 899-900.

Like pension income, Social Security income often declines after one spouse dies. Surviving spouses normally receive benefits ranging from half to two-thirds of the total a married couple received. In cases where one has not been paid for work at home, on the farm, or in a family business, a spousal Social Security check will be set at no more than half of the working spouse's check. 42 U.S.C. §402(b)(2), (c)(3), (q); 20 C.F.R. §404.333. After one dies, the survivor keeps the biggest check, or two-thirds of the total. 42 U.S.C. §402(e), 20 C.F.R. §404.335(d). Where both earned equal benefits on their own, the couple's income will be cut in half at the first death.

Contrary to Petitioner's version of the legislative history, Pet. Brief at 35, the House was not opposed to allocating extra resources to the community spouse for ongoing support. Its court-ordered support provision, now at 42 U.S.C. §1396r-5(f)(3), was intended to allow a resource transfer that would not run " . . . afoul of the transfer of asset prohibitions, even where the effect is to leave the community spouse with countable resources in excess of $48,000 [the maximum the House had otherwise placed on the ~~Community~~ Spouse Resource Share]." H.R. Rep. 105(II) at 73, 1988 U.S.C.C.A.N. at 896.

B. The Impact on the State of Wisconsin and Nursing Homes is Negligible.

Petitioner has speculated about the cost to Wisconsin's Medicaid budget, Pet. for Writ of Certiorari at 20, but has failed to share its actual experience with the Court. The ELS-W analysis of Petitioner's public records suggests the impact is negligible.

We estimate Petitioner approved about 1,000 new Medicaid funded spousal impoverishment cases in 1999. That year, Wisconsin nursing homes had 51,186 new admissions and just under 14% were on Medicaid at admission. *See* WDHFS, *Wisconsin Nursing Homes and FDD 1999* at 29 (Nov. 2000) (App., *infra*, 11-13). Past studies indicate about 14% of nursing home residents have a community spouse.[13] Thus, about 7,200 of the persons admitted by Wisconsin nursing homes in 1999 had a community spouse and of those, about 1,000 were on Medicaid at admission.

Since "resource first" again became the law in July 2000,[14] "resource first" allocations resulted in Medicaid eligibility for 10 of the cases[15] posted on the State's

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[13] Department of Health and Social Services, *Profile of Nursing Home Residents 1994* (Dec. 1995), indicating 20% of nursing home residents were married, Table 4, at 7 (App., *infra*, 16) and 71% of married residents had a spouse living in the community, Table 5, at 8 (App., *infra*, 17). The Department of Health and Social Services was Petitioner's predecessor.

[14] See note 2, infra.

[15] They are among the Medical Assistance Resource Allocation (MRA) decisions decided by the Division of Hearings and Appeals (DHA) and posted at http://dha.state.wi.us/static/.

Internet site through September 30, 2001. These 10 cases were decided over the 14 months "resource first" has been in effect. At the end of September 2001, 32 MRA decisions had been posted for the year, running slightly ahead of 1999, the last full year under "income first." In 1999, 28 MRA cases were decided. DHA Appeals Closed by Hearing, 01/01/99 to 12/31/99 (Apr. 26, 2000). The amount each of these community spouses kept due to the "resource first" allocation is shown in the table at App., *infra*, 8.

On average, each of the 10 community spouses kept an extra $58,000. At Wisconsin's $4,075 average monthly private pay rate for nursing home care (Brief of the American Health Care Association at 28), this results in 14.23 months of accelerated eligibility per case. They are not wealthy people. Perhaps half are retired farmers. Others are married to retired factory and government workers who receive pensions.

"Resource first" accelerates Medicaid eligibility in exchange for a higher post-eligibility cost-share as compared to "income first." The monthly cost (federal and state funds) per case to Wisconsin is $2,000. Petition for Writ of Certiorari at 20. The total annual impact on Wisconsin's Medicaid budget would be $24,000 per month or $240,000. The cost over the 14 plus months of accelerated eligibility for all 10 cases would be less than $360,000, assuming all 10 institutionalized spouses live that long.

According to the American Health Care Association (AHCA), it costs Wisconsin nursing homes $738 for each month of accelerated Medicaid eligibility; the difference between the monthly private pay rate of $4,075 and the Medicaid reimbursement rate of $3,336.90. AHCA Brief at

28. The lost revenues to Wisconsin's nursing homes are $7,380 per month for the 10 cases or $88,560 per year; about $11.34 for each of the 7,808 private pay patients Wisconsin nursing homes admitted in 1999. *Wisconsin Nursing Homes and FDD 1999*, at 29 (App., *infra*, 12). Wisconsin's growing elderly population has not been flocking to nursing homes. Unoccupied beds in Wisconsin nursing homes, rose from 10% in 1994 to 15% in 1999. Wisconsin Legislative Fiscal Bureau, LFB 2001-03 Budget Paper #466, *Nursing Home Reimbursement (DHFS-Medical Assistance)* at 7-8 (June 2001).

When we look at Wisconsin's experience, it is important to remember that today's frail elderly nursing home resident may have been yesterday's community spouse. Other than Social Security, investment assets are the only permanent income source a couple may have that does not disappear after a spouse dies. Most people whose health takes away their ability to live independently want to stay in their own homes or live in someone else's home, if at all possible. Nathalie D. Martin, *Funding Long-Term Care: Some Risk Spreaders Create More Risks than They Cure*, 16 J. Contemp. Health L. & Pol'y, 355, 360-365 (2000). Next, they choose an assisted living or continuing care setting, with a nursing home the choice of last resort. *Id.* They will use their savings to pay for the more desirable and less restrictive settings, hoping they will not last longer than their money. *Funding Long-Term Care, supra* at 365-369. The less money yesterday's community spouse has today, the more Medicaid will pay in the long run.

CONCLUSION

For the reasons argued above, the *Amicus* Elder Law Section of the State Bar of Wisconsin respectfully urges the Court to affirm the decision of the Wisconsin Court of Appeals in all respects.

Respectfully submitted,

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October, 2001

APPENDIX

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42 U.S.C. §1396(a)(k) before its repeal by Pub. L. 103-66

* * *

Subsec. (k). Pub. L. 103-66, Sec. 13611(d)(1)(C), struck out subsec. (k) which read as follows:

> "(k)(1) In the case of a medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17) of this section, is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term 'grantor' means the individual referred to in paragraph (2).
>
> "(2) For purposes of this subsection, a 'medicaid qualifying trust' is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.
>
> "(3) This subsection shall apply without regard to –
>
> "(A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this subchapter;
>
> or

"(B) whether or not the discretion described in paragraph (2) is actually exercised.

"(4) The State may waive the application of this subsection with respect to an individual where the State determines that such application would work an undue hardship."

* * *

3261 GENERAL AND CATEGORICAL ELIGIBILITY REQUIREMENTS 10-89

Spousal Resource Allowances. – The differences in the dollar value of resources protected for community spouses and the value of the resources actually held in the name of community spouses.

Promptly Assess Resources. – Within 45 days from the date of request for an assessment unless delays are due to non-receipt of relevant documentation or verification from the requesting party or a third party (e.g., a bank, an insurance company or brokerage) is received within 45 days of receipt of documentation or verification when persons requesting assessments do not provide necessary information to States timely. States may not use the time standards as a waiting period, or as a reason for not completing assessments within the time frames.

A Support Right. – Pending publication of regulations, a reasonable definition is: The right of institutionalized spouses to receive support from community spouses under State law.

Assigned Support Rights. – Pending publication of regulations a reasonable definition is: An assignment of a support right allowing you to go against community spouses for reimbursement of some or all of the medical care provided to institutional spouses. You must assess your own State laws to determine what laws give rise to support rights and the amount of medical costs community spouses are asked to cover and whether you are limited to seeking support in the amount community spouses' resources exceed spousal allowances.

Undue Hardship. – Is defined by States and submitted to HFCA for approval as plan policy.

3261 INCOME ELIGIBILITY

3261.1 Income Eligibility Determinations for Institutionalized Members of Couples –
When first determining eligibility:

- Use plan policies not governed by §1924 to define ownership in income.

- Do not deem income from a community spouse to an institutionalized spouse for any month of institutionalization.

- Compare institutionalized spouses' income after applying deductions specified in the plan to the appropriate eligibility standards for one person (i.e., categorically needy or medically needy).

Beginning with the first regularly scheduled redetermination of eligibility under 42 CFR §435.916 use the following rules governing couples' ownership in income to determine institutionalized persons' income eligibility, irrespective of State laws governing community property

or division of marital property. These rules apply as follows:

* * *

3240.4 More Restrictive Methods Prohibited Under This Option – Unless it is specifically authorized under the Medicaid statute (e.g., you have elected the option under §1902(f) of the Act to use more restrictive eligibility requirements), you may not use income or resource methods that are more restrictive than those used under the most closely related cash assistance program. A method is more restrictive if any individual who is otherwise eligible under the rules of the most closely related cash assistance program is ineligible under your alternative method. Therefore, do not employ a policy which, although it may result in a more liberal application of policy in some instances, results in denying Medicaid to persons who are eligible if the equivalent cash assistance rule is used to determine eligibility.

EXAMPLE: A policy defines a couple, for purposes of determining eligibility in SSI States, as persons who are legally married. This is a more limited definition than that used under the SSI program, which also includes, under the definition of couples, persons who are not legally married but hold themselves out to the community to be husband and wife.

Under the proposed alternative policy, couples who are not legally married, but hold themselves out to the community to be husband and wife, are considered as individuals for purposes of determining their Medicaid eligibility. Therefore, separate income and resource standards are used to determine eligibility rather than the standards for couples, which are lower than two times the individual standards.

Use of the higher separate standards is advantageous to some couples, e.g., in cases where one member of a couple has a higher income and the combined income of the couple exceeds the couple standard. Under the alternative policy, one member of the couple is eligible. However, in other cases, the couple may be ineligible when the alternative policy is applied, but eligible if the SSI policy were applied, e.g., in cases where the combined income and resources are below the couple standard.

3240.5 Federal Financial Participation Levels. – In order to receive FFP for services provided to recipients under your plan, place limits on the income of those individuals and families. There are two separate limits which apply to the eligibility groups for whom you may employ more liberal income methods. (There are no FFP limits on resources held by recipients.)

Adhere to the following descriptions of the maximum income limits in developing your eligibility plan policies.

A. The 133 and 1/3 Percent Limit. – This income limit applies to the medically needy and to most other Medicaid only eligibility groups (including AFDC-related categorically needy groups) except those subject to the 300 percent limit described below, and the groups described in §3240.6. The AFDC program has a separate income threshold test that is equal to 185% of the AFDC need standard. You are not required to use the 185% income

test for AFDC-related categorically needy eligibility groups, but may apply it provided Medicaid FFP limits are not exceeded.

The 133 and 1/3% FFP limit with respect to any family is an amount (minus appropriate cash assistance deductions and incurred medical and remedial care expenses) which does not exceed a standard that is equal to 133 1/3 percent of the highest amount that ordinarily is paid to an AFDC family of the same size that has no countable income. Income deductions for purposes of defining countable income are limited to those of the cash assistance programs. More liberal deductions authorized under §1902(r)(2) of the Act are not deducted for this purpose.

Families for this purpose include all persons living in the home who are applying for Medicaid and who would be in the same family unit for purposes of determining AFDC eligibility whether or not the family is AFDC-related. Families always include financially responsible relatives living in the home, unless such relatives are receiving SSI benefits. This same family configuration applies to families including aged, blind and disabled, as well as AFDC-related families.

If your AFDC plan specifies a maximum family size beyond which there is no increase in benefits, determine income standards for families exceeding that maximum by adding an amount for each individual family member beyond the maximum. The amounts added must be reasonably related to amounts by which your AFDC plan increases benefits per additional family member up to the maximum size.

B. The 300 Percent Limit. – This income limit applies to persons receiving optional State supplements, those who are eligible for State supplements, those who would be eligible for State supplements if they were not in medical institutions, and institutionalized individuals who are eligible under State established special income levels. These groups are described in §§1902(a)(10)(A)(ii)(IV), (V) and (XI) of the Act. Although not specifically identified in the statute, the income limit also applies to groups in §§1902(a)(10)(A)(ii)(VI) and (VII). This is because members of these groups derive their eligibility by virtue of the eligibility rules of groups which are subject to the 300% limit. This includes individuals who are receiving home and community-based services under a waiver or hospice care who would be eligible if they were in a medical institution.

Under this provision, FFP is not available for services rendered to individuals whose income (without regard to the exclusions of income described in §1612(b) of the Act) exceeds 300% of the Federal Benefit Rate (FBR) for an individual under §1611(b)(1) of the Act.

Cases in which *Blumer* Increased the Community Spouse Resource Share
As of September 30, 2001

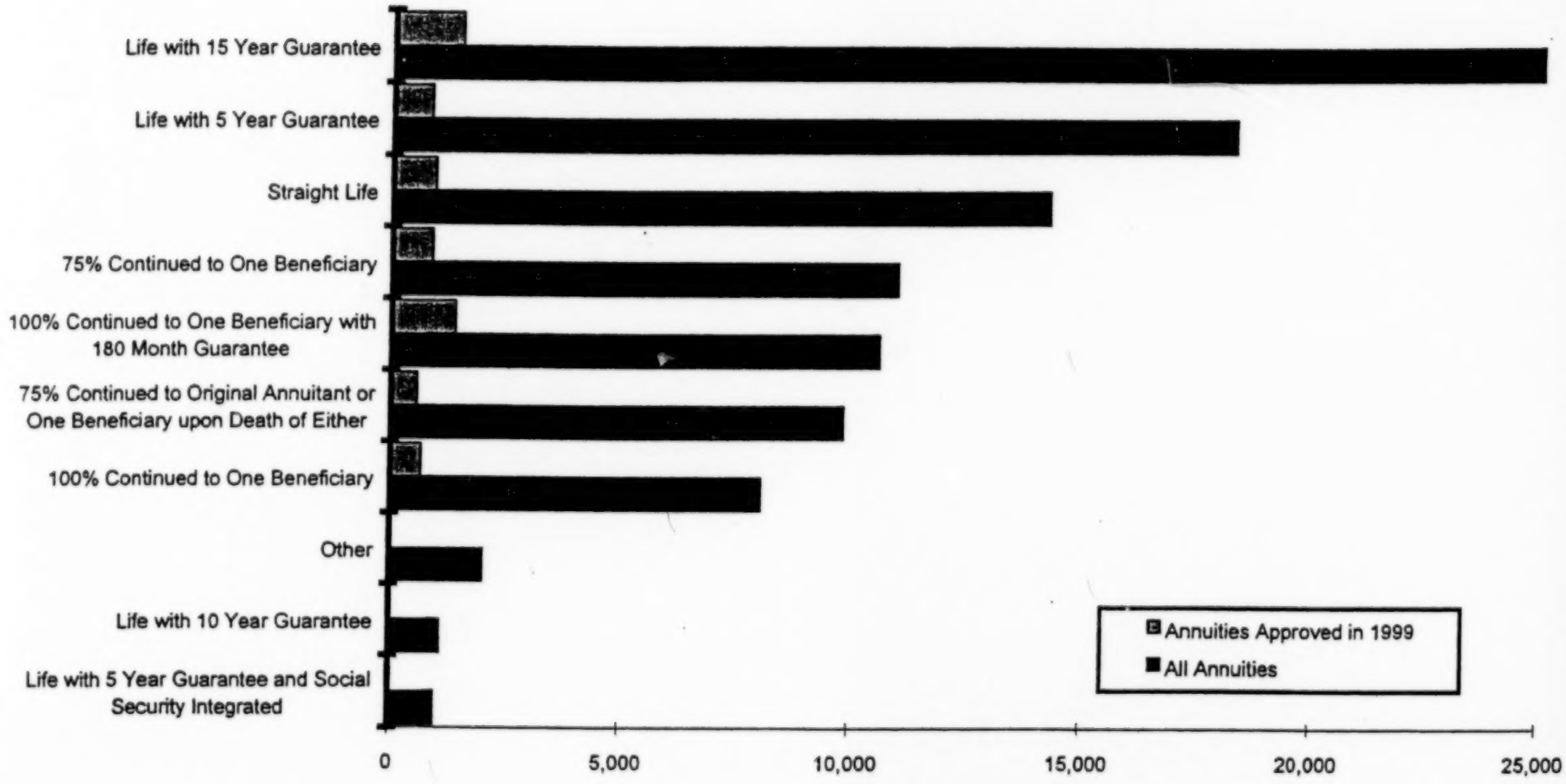
		Community Spouse Resource Share	
DHA Case No.	Couple's Resources	Without **Blumer**	**Blumer** Increase
MRA-09/ 47931	$64,137	$52,000	$12,137
MRA-44/ 47850	$137,113	$73,597	$63,516
MRA-70/ 49065	$127,309	$89,000	$38,309
MRA-70/ 48333	$108,967	$56,483	$52,484
MRA-70/ 47970	$107,408	$55,704	$51,704
MRA-44/ 49009	$136,882	$70,176	$66,706
MRA-25/ 48984	$131,209	$67,604	$63,605
MRA-22/ 48798	$118,490	$58,423	$60,067
MRA-11/ 47906	$195,715	$86,120	$109,595
MRA-67/ 49302	$134,328	$73,201	$61,127
Totals	$1,261,558	$682,308	$579,250

Wisconsin
Department of Employe [sic] Trust Funds
Eric O. Stanchfield
Secretary
[SEAL]

Comprehensive
Annual
Financial
Report
1999

801 West Badger Road
P. O. Box 7931
Madison, WI 53707-7931

Annuities by Payment Option



App. 11

Wisconsin
Nursing Homes
and
Facilities for the Developmentally Disabled
1999

November 2000

Bureau of Health Information
Division of Health Care Financing
Department of Health and Family Services

Table 13. Primary Pay Source at Admission for Nursing Home Residents, Wisconsin 1990-1999

Year	Primary Pay Source at Admission					Total Admissions
	Medicare	Medicaid	Private Pay	Managed Care	Other Sources	
1990	10,271	6,727	9,382	---	635	27,015
1991	11,258	7,454	9,604	---	473	28,789
1992	13,329	7,111	8,961	---	778	30,179
1993	14,846	6,973	8,473	---	679	30,971
1994	19,863	7,287	8,231	---	840	36,221
1995	24,250	6,326	8,148	---	479	39,203
1996	28,326	6,296	7,392	725	744	43,483
1997	33,115	6,988	6,892	1,164	891	49,050
1998	34,214	6,880	7,750	1,811	540	51,195
1999	33,601	7,030	7,808	2,223	524	51,186

Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

Notes: Managed care plans were not asked about as a separate pay source until 1996.
The category "Other Sources" includes mostly residents whose primary pay source was the Department of Veterans Affairs.
Totals include residents whose primary pay source at admission was not reported.

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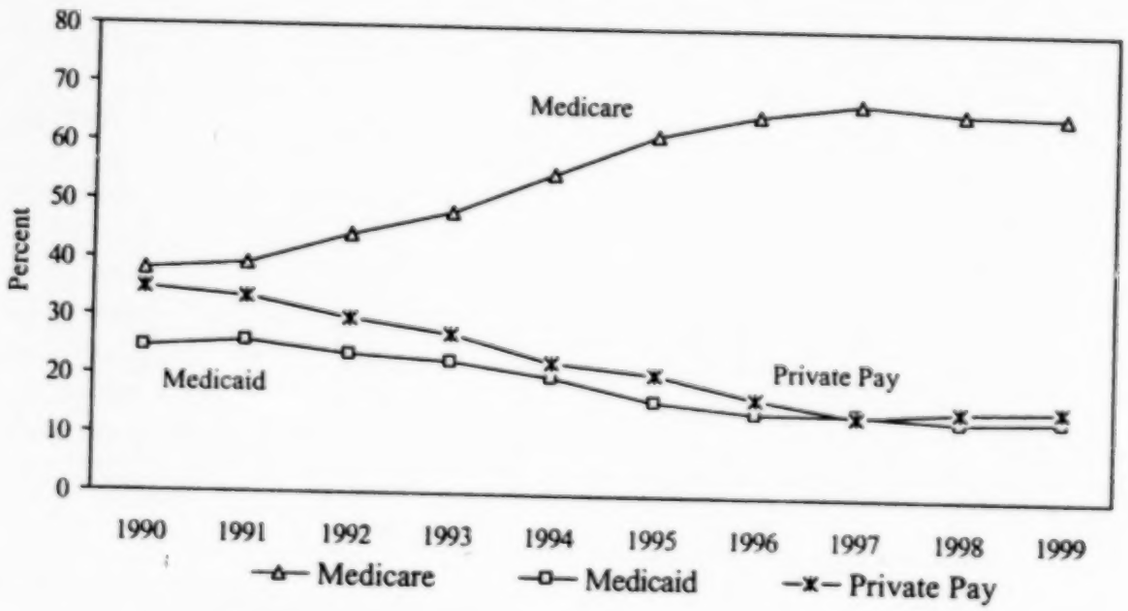
Figure 4. Primary Pay Source at Admission, Wisconsin 1990-1999



Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

- Medicare was the primary pay source at admission for 66 percent of nursing home residents admitted in 1999, down from 68 percent in 1997. As primary sources of payment at admission, private pay and Medicaid have remained stable at about 14 to 15 percent each year since 1997.

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Table 23. Age of Nursing Home Residents by Licensure Category, Wisconsin, December 31, 1999

	Licensure Category					
	SNFs/ICFs		IMDs		Total	
Age of Resident	Number	Percent	Number	Percent	Number	Percent
Less than 20 years	13	0%	2	1%	15	0%
20-54 years	1,172	3	138	48	1,310	3
55-64 years	1,486	4	44	15	1,530	4
65-74 years	4,173	11	51	18	4,224	11
75-84 years	12,881	33	34	12	12,915	33
85-94 years	16,189	41	14	5	16,203	41
95+ years	3,519	9	3	1	3,522	9
All ages	39,433	100%	286	100%	39,719	100%
65+ years	36,762	93%	102	36%	36,864	93%
85+ years	19,708	50%	17	6%	19,725	50%

Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

Notes: Percentages may not add to 100 percent due to rounding. SNFs are Skilled Nursing Facilities; ICFs are Intermediate Care Facilities; IMDs are Institutions for Mental Diseases.

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PROFILE OF WISCONSIN
NURSING HOME RESIDENTS
1994

December 1995

Center for Health Statistics
Division of Health
Department of Health and Social Services

Table 4. Estimated Percent of SNF Residents by Marital Status and Age, Wisconsin 1994

Age Groups	Marital Status				
	Married	Single	Widowed	Divorced	Total
<55	16%	45%	3%	36%	100% (1,320)
55-64	28	30	17	25	100 (1,470)
65-74	32	21	28	19	100 (4,650)
75-84	28	11	53	7	100 (13,850)
85-94	13	9	74	4	100 (17,100)
95+	4	7	86	3	100 (5,670)
Total	20	13	59	8	100 (42,060)

A much higher percentage of male than female residents were married (38 percent versus 13 percent); conversely, 71 percent of females were widowed, compared to 29 percent of males (Figure 2 omitted). Within each successive age group, a larger percentage of females were widowed; among residents aged 85-94, for example, 81 percent of females and 48 percent of males were widowed.

Table 5. Estimated Percent of Married SNF Residents by Residence of Spouse, Wisconsin 1994

Location of Spouse	Male	Female	Total
In nursing home	18%	26%	21%
In community	75	65	71
Other	7	10	8
Total*	100 (4,730)	100 (3,790)	100 (8,520)

* Excludes married residents whose spouse's residence was unknown.